CENSORIAL COPYRIGHT

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INTRODUCTION

U.S. copyright law is today justified in exclusively utilitarian terms. Drawing from the constitutional directive that copyright exists to "promote the progress,[1]" courts, scholars and legislators identify copyright's primary purpose to be the inducement of creativity. According to this theory, which has in recent times assumed an overt economic orientation, copyright's promise of limited market exclusivity over original expression functions as an ex ante incentive for the very production of such expression.[2] By promising authors a set of marketable exclusive rights in their works, copyright is believed to incentivize the production of works of authorship. Copyright's very raison d'être is therefore seen to lie in its role as a market-based incentive for creative production.[3]

Yet in practice copyright does much more than just induce creativity through the market. Ever since its origins, copyright law has seen a robust set of infringement claims being brought that have no connection whatsoever to the market. These are not just infringement claims that lack a market basis owing to the creator's unique circumstances; they are instead claims that are motivated by decidedly non-market considerations. Rather than seeking to curb competition for the production and dissemination of the work, these claims are brought *by authors* and *driven* by the desire to prevent *any* distribution of the work because of the non-economic harm that such dissemination is likely to cause them. These claims are best described as "censorial" claims since they involve the author

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[1] U.S. Const., Art. I, §8, Cl. 8.

[2] For scholarly work either pushing this idea or assuming its centrality to copyright law, see: William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 13 (2003); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569, 1576-81 (2009); Christopher S. Yoo, *Copyright and Public Goods Economics: A Misunderstood Relation*, 155 U. Pa. L. Rev. 635, 643 (2007); William. W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1702 (1988); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 Vand. L. Rev. 483 (1996).

[3] *Cf.* Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 Mich. L. Rev. 1197 (1996) (arguing that the justification is more rhetorical than real).

seeking to legitimately suppress the publication of expression that is his/her own creation.

Paradigmatic of censorial copyright claims are actions brought for the public distribution of work consisting of content that its author does not want revealed publicly, *and* which on its face also discloses its author's identity. In these situations, the publication (or distribution) compels the author to publicly accept authorship of the work against his or her will. In so doing, it produces a form of dignitary harm that melds considerations of privacy, personality, and autonomy.

As an example, consider the successful use of copyright law by a recent victim of revenge pornography.[4] The plaintiff in the case had taken intimate photographs of herself and shared them with the defendant, her boyfriend at the time. When their relationship soured, the defendant began publicly distributing those photographs—without her consent—in an effort to humiliate her. The work thus embodied sensitive content and simultaneously risked revealing the identity of its subject and creator. The plaintiff thereafter promptly registered the work and commenced an action against the defendant for copyright infringement, which culminated in her obtaining a permanent injunction enjoining the distribution of the images as well as a large award of damages.[5] As should be obvious, copyright's market rationale played no role in the plaintiff's creation of the work and in her infringement claim. Instead, the claim was driven by distinctively non-economic considerations. Commentary and coverage examining the case has uniformly agreed with the outcome, but nevertheless doubted the suitability of employing copyright to this end.[6] The rationale for the mismatch is taken to originate in the view that copyright law ought to be only ever invoked when the creative incentive (and its connected market attributes) is at issue, and not otherwise.

This perceived mismatch arises from a myopic understanding of copyright law and its normative ideals. Contrary to common wisdom, the use of copyright in revenge pornography cases is but a modern addition to the category of censorial copyright claims, a category that is almost as old as the institution

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[4] Doe v. Elam, Case 2:14-cv-09788-PSG-SS (C.D. Cal., April 4, 2018) (Default Judgment).

[5] *Id.* at 6-9.

[6] For coverage of the case: Sara Ashley O'Brien, *Woman awarded $6.45 million in revenge porn case*, CNN, Apr. 9, 2018, https://money.cnn.com/2018/04/09/technology/revenge-porn-judgment/index.html; Christine Hauser, *$6.4 Million Judgment in Revenge Porn Case is Among Largest Ever*, N.Y. Times, Apr. 11, 2018, https://www.nytimes.com/2018/04/11/us/revenge-porn-california.html; Max Jaeger, *The ingenious way revenge porn victims are fighting back*, N.Y. Post, Apr. 11, 2018, https://nypost.com/2018/04/11/the-ingenious-way-revenge-porn-victims-are-fighting-back/. As an example of this skepticism, see: Erica Fink, *To fight revenge porn, I had to copyright my breasts*, CNN, Apr. 26, 2015, https://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html (describing the use of copyright as an "extreme" and "creative" solution, while mischaracterizing the very subject matter of copyright protection).

of copyright itself.[7] Protecting the author's dignitary interest and its underlying commitment to authorial autonomy that motivate these claims has remained an important normative goal of copyright law despite the multiple doctrinal variations and updates that it has gone through over the last three centuries. Publication, which for long had been seen as copyright's principal analytical device for protection, is routinely conceived of in entirely commercial terms. In so doing, this exclusive focus on the commercial aspects of publication ignores the complex set of non-economic factors that motivate an individual's decision of whether, when, and how to embrace the identity and title of "author"—a decision that lies at the root of censorial copyright claims.

Affording authors a mechanism of private redress for interferences with their authorial autonomy has for long remained central to copyright doctrine. And yet, modern American copyright thinking exhibits a marked reluctance to acknowledge this as a legitimate goal for copyright law, preferring instead to relegate all non-economic interests to the domain of moral rights. Generally speaking, Anglo-American authorial interests are today classified into two broad categories—known as the "dualist" model of copyright.[8] On the one hand are the creator's economic interests, believed to be protected entirely by copyright's set of marketable exclusive rights. And on the other are the creator's authorial interests, served by inalienable "moral" rights, rights that are taken to protect the creator's reputational interests as manifested in the work.[9] Not only are these two categories treated as mutually exclusive, but they are also considered exhaustive of the kinds of interests involved. In other words, the category of moral rights is routinely treated as the exclusive (if not principal) basis for protecting the creator's non-economic interests.

As understood by U.S. law today, moral rights do little to protect the interests involved in censorial claims.[10] They protect authors against harmful mutilations of the work and wrongful attributions of authorship. To the extent that they serve the reputational interests of authors, they only ever do so for the author's reputational interests as embodied *in the work*, and never

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[7] Perhaps the earlier censorial copyright case was *Pope v. Curl*, 2 Atk. 342 (Ch. D. 1741) (U.K.). For more on the motivations in in the case, see: Mark Rose, *The Author in Court:* Pope v. Curll *(1741)*, 21 Cult. Critique 197 (1992).

[8] Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 Cardozo Arts & Ent. L.J. 1, 21-23 (1994); Cyrill P. Rigamonti, *The Conceptual Transformation of Moral Rights,* 55 Am. J. Comp. L. 67, 74 (2007) (describing the dualist theory and its differences from monist approaches). As Rigamonti argues, the distinction is hardly watertight and most jurisdictions exhibit some overlap in practice. *Id.* at 75-77.

[9] *See* Martin A. Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 Harv. L. Rev. 554, 557 (1940); Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 Harv. Int'l L.J. 353 (2006).

[10] Limited moral rights are today codified in the Copyright Act. *See* 17 U.S.C. §106A (2012). As discussed later, moral rights protection remains more expansive in civil law countries, where aspects of censorial claims would find protection under the right of disclosure. *See infra* Section I.C.

independently.[11] While the interests at issue in censorial claims emanate from the distribution and display of the work, those interests are hardly embodied within the work itself. The work is instead the principal means through which the expressive harm is inflicted; yet the harm manifests itself well beyond the four corners of the work itself.

What justifies the persistence of censorial claims within copyright is the reality that the root of these claims is in an important sense authorial, despite implicating other concerns. The work involved in a censorial claim very much originates with the creator and in addition assumes a uniquely personal status to its creator owing to its content, which is subjectively personal to the author. The content of the work comes to be indelibly tied up with the identity of its creator in a way that renders it impossible to extricate the two in dealing with the work. Disseminating the work against its creator's wishes therefore amounts to a denial of authorial autonomy, not just in its being an infraction of authorial control over the work, but additionally in the sense of compelling its creator to accept a set of responsibilities and consequences, as author, against her will. And unlike with moral rights, the interference with the author's autonomy occurs not through any harm *to the* work, but quite distinctively instead *through the* work. Safeguarding the author's right to exclude others from the work is therefore the essence of censorial claims.

Appreciating the significance of censorial copyright claims necessitates recognizing that at its root copyright law functions by rendering forms of expressive harm (i.e., harm arising from acts of expression) privately actionable. The primary form of expressive harm that copyright ordinarily centers around is appropriative in nature, from instances of copying. Censorial copyright claims have little to do with appropriative harm. The expressive harm at issue emerges instead from the mere dissemination and/or use of the protected work without the creator's authorization, regardless of the objective utility or value of such actions. In this respect, it closely resembles other forms of censorial causes of action such as defamation, false light and disparagement. And much like these other causes, censorial copyright claims implicate free speech and First Amendment concerns most directly.[12] Unlike with appropriative copyright claims, which implicate free speech concerns tangentially, censorial copyright claims are by their very nature speech-impeding since their primary focus is on curbing the dissemination of protected expression, regardless of its market effects. Consequently, balancing these claims against free speech considerations becomes essential not just to safeguarding speech, but also in order to ensure the

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[11] The legislative history accompanying the enactment of the U.S. moral rights law makes this abundantly clear. H.R. Rep. 101-514, 1990 U.S.C.C.A.N. 6915, 6925 (noting that protection is limited to "artistic or professional honor or reputation of the individual *as embodied in the work that is protected*") (emphasis added).

[12] *See* Joel D. Eaton, *The American Law of Defamation through* Gertz v. Robert Welch, Inc. *and Beyond*: *An Analytical Primer*, 61 Va. L. Rev. 1349 (1975).

fuller recognition and legitimacy of censorial copyright claims, which are today relegated to the shadows of the copyright system.

This Article develops a theoretical framework to understand and analyze the working of censorial copyright claims, which it argues remain an undeniable feature of the copyright landscape. It shows how contrary to common wisdom, these claims are as old as copyright law itself and reveal the existence of a hitherto unappreciated source of normative pluralism within the copyright system. Drawing on the working of non-copyright censorial claims, it then develops a mechanism for courts to differentiate legitimate censorial copyright claims from mere attempts at censorship.

Part I unpacks the basis of censorial copyright claims, by examining how they seek to redress a particular form of copyright harm known as disseminative harm (I.A). It then analyzes the principal nature of harm that such claims involve, showing how they meld considerations of privacy, personality and autonomy and traces the justificatory logic of such claims to the German philosopher Immanuel Kant (I.B). Part II then addresses the distinction between censorial copyright claims and privacy claims. It first examines the principal arguments made in favor of using privacy torts to cover the interests at issue in censorial copyright claims and shows them to be flawed (II.A.); it then examines the reasoning of the famous Warren and Brandeis article that formed the basis of the modern law privacy to show how it misunderstood the working of censorial copyright claims (II.B); and shows how censorial copyright claims might be understood as simulating the working of a lesser known moral right—the right of disclosure (II.C). Part III examines evolution of censorial copyright claims over time—first in early English law (III.A), then in early and nineteenth century American law (III.B), and finally under modern American copyright law (III.C). Finally, Part IV looks at the conflict between censorial copyright claims and First Amendment concerns and develops a mechanism for courts to use in balancing the two while adjudicating these claims.

I. THE BASIS FOR THE CENSORIAL COPYRIGHT CLAIM

The theory of creator incentives today dominates U.S. copyright thinking. A product of neoclassical economic thinking, this theory posits that creators/authors are rational actors who produce original expression based on the law's promise of limited market exclusivity for such expression, once brought into existence.[13] Market exclusivity—produced through a prohibition

[13] William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law 13 (2003); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569, 1576-81 (2009); Christopher S. Yoo, *Copyright and Public Goods Economics: A Misunderstood Relation*, 155 U. Pa. L. Rev. 635, 643 (2007).

on copying—is thus taken to induce creative authorship and seen as the principal justification for the very existence of copyright.

Despite its ubiquity and general acceptance, the incentives account is hardly problem-free. To begin with, its universality remains dubious given that it is hardly premised on any empirical validation.[14] Second, longstanding copyright law principles and doctrine have little connection to the incentives account, a rather anomalous situation.[15] Despite recurrent calls to reform the system to reflect this putative alignment, copyright law has consistently rejected such modifications. And third, the incentives account readily presumes that the work at issue—the author's original expression that is the subject of protection—is little more than a marketable commodity to that author. In other words, authorship is taken to be copyright's mechanism for rent-seeking.

Ever since its early days, Anglo-American copyright law has recognized a set of claims that have little connection to the logic of the market or creator incentives. In numerous situations, creators of original works of expression seek to have the work taken out of public circulation when it is published and/or distributed without their consent. Their rationale for doing so has little to do with the market and is instead intricately connected to the nature and content of the work at issue, which for subjective reasons the author prefers to keep private. These claims are best described as "censorial" copyright claims since they emanate from a distinctively expurgatory motivation. Copyright's standard logic of economic value, market harm and authorial incentives is far removed from these claims, which it has a hard time accounting for. This Part sets out the working of censorial copyright claims and offers a justification for them.

A. Disseminative Harm

An indisputable reality of copyright law ever since its origins has been its structure as a private law claim. While often characterized as a form of "property", in reality copyright operates by granting creators/owners a private cause of action for certain kinds of unauthorized uses of their creative works.[16] The core of copyright therefore lies in its active delegation of authority to creators for them to determine when/whether to commence an action for infringement, even when an unauthorized interference occurs. The decision whether to commence an action for infringement is therefore entirely dependent

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[14] Diane Leenheer Zimmermann, *Copyright as Incentives: Did We Just Imagine That?*, 12 Theoretical Inquiries in the L. 1 (2011) (discussing the origins of the incentives rationale and the lack of an empirical basis for it).

[15] Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569, 1581-89 (2009) (identifying the mismatch between copyright doctrine and the theory of creator incentives).

[16] For a fuller elaboration of this idea and copyright's normative structure as a private law institution, see: Shyamkrishna Balganesh, *The Obligatory Structure of Copyright Law*, 125 Harv. L. Rev. 1664 (2012).

on the creator-plaintiff's rational motivations for the action.[17] In essence then, copyright functions as a form of civil redress.

Despite its structure as a form of redress, the precise form of harm that an action for copyright infringement is directed at remains multifarious. Owing to its focus on creative expression and the unauthorized use of such expression, actions for copyright infringement—as a class—aim to redress a form of harm within the broad category of "expressive harm," or harm from expression. Here, copyright law is but one of several other types of private actions (some also censorial) that are directed at expressive harm such as defamation, false light, public disclosure of private facts, and false advertising all of which are also actions aimed at specific types of expressive harm. The specific type of expressive harm that copyright law aims to redress—best described as "copyright harm"—is then capable of being understood in different ways.

The first, and most common, form of copyright harm emanates from acts of unauthorized copying and is aptly called "appropriative harm". Here the harm ensues from the wrongful appropriation by the defendant of the plaintiff's protected expression, which in turn produces either economic and/or non-economic harm to the plaintiff. The economic harm is principally substitutionary in nature in that it interferes with the market for the original work and dissipates the creator's revenue therein,[18] while the non-economic harm is associated with the idea that the appropriation is interfering with the creator's ability to speak, and acting as a form of compelled speech.[19] Since the right to prevent unauthorized copying is often seen as copyright's core—or gatekeeper—right, this form of harm is copyright's most basic form of harm and is commonly (though mistakenly) taken to exhaust the category of copyright harm.

A second form of copyright harm that the U.S. copyright system has recognized since 1990 originates in its limited recognition of moral rights protection in the form of the rights of integrity and attribution.[20] A common feature of both rights is that they derive from the need to protect the author's reputation.[21] In essence therefore, the form of harm that they are directed at is a

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[17] For a general account of the rational motivation commence a private law enforcement action, see, see: Sean Farhang, The Litigation State 22 (2010).

[18] *See, e.g.*, Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 Minn. L. Rev. 317, 355 (2005); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. Rev. 212 (2004).

[19] The leading account here is of Abraham Drassinower. Abraham Drassinower, What's Wrong with Copying? 111 (2015). Drassinower's account is based on a Kantian theory of copyright, under which copyright seeks to protect the work in its capacity as a speech-act rather than as an independent object. For a review and critique, see: Shyamkrishna Balganesh, *The Immanent Rationality of Copyright Law*, 115 Mich. L. Rev. 1047 (2017).

[20] 17 U.S.C. §106A (2012).

[21] For a normative analysis of moral rights, identifying their purpose as protecting the creator against "reputational externalities," see: Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Comparative Analysis*, 26 J. Legal Stud. 95, 104 (1997).

reputational harm. Yet, the reputational harm is fairly unique in that it is limited to the author's reputation *as manifested in the work*. The integrity right focuses on protecting against a mutilation or distortion of the work in the recognition that this would impact the authorial reputation directly. The attribution right focuses on ensuring that a work is not wrongly attributed to the author, and that the right work is accurately attributed to the author, again with the recognition that attributions contrary to the author's actions and intent do harm to authorial reputation. And again, the principal focus of the attribution is through the work.[22] This form of harm is therefore best characterized as "*in situ* reputational harm", and while non-economic in character is nevertheless circumscribed by the need for the harm to emanate from an action *to* the work at issue and not independently.

It is, however, a third category of often ignored copyright harm that forms the basis of censorial copyright claims. This is the harm that inures to the creator from the dissemination of the work without the author's consent or authorization. Ordinarily, discussions of unauthorized disseminations focus on the unauthorized distribution of unauthorized copies, as a result of which the harm from such distribution is taken to be duplicative of the appropriative harm previously described.[23] To the limited extent that it is seen as analytically distinct however, it is taken to be a form of economic harm, ensuing from the substitutionary effect of the unauthorized distribution on the market for the author's original (i.e., authorized) copies of the work. The harm from distribution is therefore usually seen as parasitic on appropriative harm or limited to its economic consequences.

An unauthorized dissemination can however do much more damage that just economic harm. In some situations, the dissemination is harmful not for its economic effects, but instead because of the interference with an author's unique dignitary interest that it entails. Understanding how this dignitary interest comes to be sheds light on the nature of disseminative harm.

In various situations, individuals produce original expression that they intend to keep private, or limit to very particular recipients. This is often, though not exclusively, in the nature of private communications. And when fixed in a medium of expression, such communications become eligible for copyright protection. Given the private nature of such expression, individuals routinely

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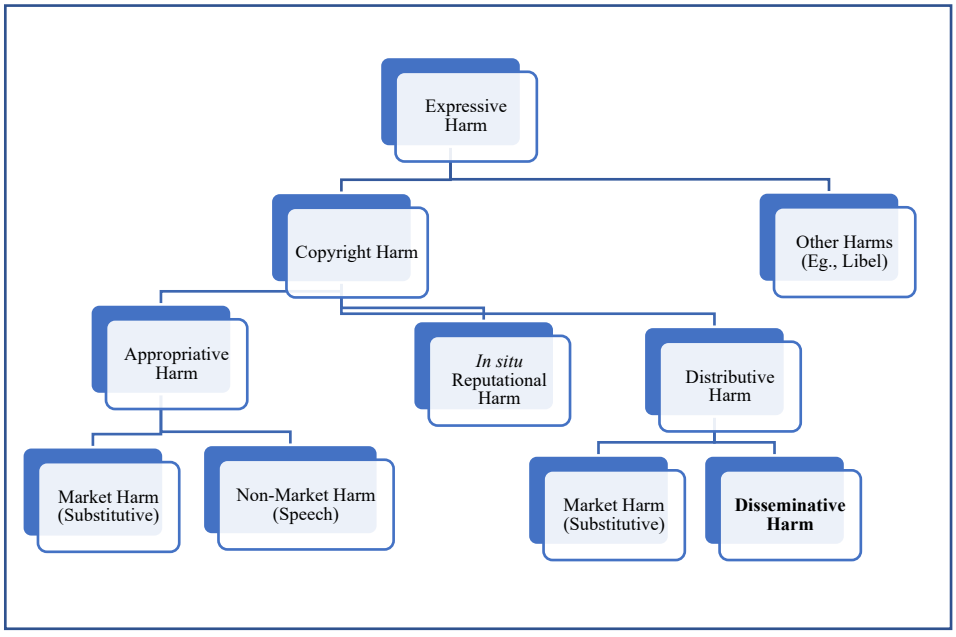
[22] The attribution right has both a positive and a negative component. *See* Hansmann & Santilli, *supra* note __, at 130. The positive component entitles the author to be affirmatively named as the author of a work that he/she has created, while the negative component entitles the author to *not* be named as the author of a work that he/she did not author. The negative component can obviously therefore be disaggregated from the author's work itself strictly speaking and is therefore not operational through the work in the sense that the positive aspect is. Yet, it too operates through the work—albeit the misattributed work—in so far as it focuses on the connection (or put more precisely, the lack thereof) between author and work and thus may be accurately described as also protecting an interest of the author in the work: the interest not to be misidentified as author of the work.

[23] *See* 17 U.S.C. §106(3) (2012) (defining the distribution right in terms of the right to "distribute copies").

inject into it aspects of their persona and individuality that they would almost certainly refrain from revealing publicly. One might even put the point more strongly: it is indeed the private nature of the expression that induces its personality-infused content. When such expression is sought to be made public—after its production—it amounts to a direct infraction of its creator's personal autonomy. Very importantly though, this infraction is two-layered. At its simplest, it repudiates the creator's choice to control how, when, and whether the work is to be shared. Yet it also entails more than that, given the nature of the work involved. By publishing the work, or disseminating it publicly, it also thereby forces the creator to admit to being the author of the work since elements of the creator's persona and identity are often apparent on the face of the work. The publication thus forces authorship on the creator, with all its social, legal, and moral implications.

The interest at the root of this scenario is thus a complex combination of elements of privacy, personality, and personal autonomy, best described as a "dignitary interest". Most importantly though, the form of harm that its violation entails is in turn best described as "disseminative" since it emanates from the mere circulation of the work without consent, *tout court.* Censorial copyright claims attempt to redress disseminative harm.

Table: A Classification of Copyright Harm



Central to disseminative harm is the recognition that the work is *personal* to its author in a rather distinctive way, which inflects the nature of the author's

autonomy at issue. That term is often used to exemplify a variety of different connections to the work, and thus bears some additional elaboration. An overwhelming number of censorial copyright claims involve work wherein the individual author has presented himself or herself in a particular way through the expression. Not only is the author's identity readily apparent from the work, but additional aspects of the author's individual *persona* are manifested in the original expression embodied in it. Personal letters, selfies, diaries, intimate photographs and videos—expressive work that is commonly the subject of censorial claims, typify this manifestation though it may occur in other less direct ways as well. The work is therefore quite genuinely a work of authorship in that there is a salient causal connection between the creator and the expression at issue,[24] but the particular content imbues that authorship with a subjectively personal dimension. This personal dimension has the effect of altering the nature of the author's autonomy interest in the work qualitatively, changing it from a form of artifact autonomy where the author's interest lies merely in the ability to control a fungible external object, to one where the author seeks to control his or her self, akin to bodily integrity. Under these circumstances, an unauthorized dissemination of the work denies authorial control not just in the abstract sense (of the author's ability to control an object). It instead is akin to a denial of the author's very sense of self. This is the essence of disseminative harm, and derives from a strong sense of autonomy—in the Kantian sense—as described later.

Under modern U.S. copyright law, disseminative harm (and thus credible censorial copyright claims) can arise for *both* published and unpublished works. Prior to the Copyright Act of 1976, the act of publication formed the dividing line between the availability of statutory copyright protection and common law copyright.[25] The very availability of statutory copyright was contingent upon the work being published; and conversely common law copyright was dependent on the work remaining unpublished. The 1976 Act eliminated this requirement and in its explication of the author's exclusive rights, replaced the idea of publication with public "distribution".[26] Instead of offering a clear definition of distribution, it then merely defined "publication" in terms of distribution, which it then exemplified through specific forms.[27] Simultaneously it also abrogated almost all common law copyright for works that it covered, such as unpublished works, which now became eligible for statutory protection.[28] Additionally, authors of works were for the first time also given a new exclusive right—the display

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[24] *See* Shyamkrishna Balganesh, *Causing Copyright*, 117 Colum. L. Rev. 1, 1-23 (2017) (describing authorship as requiring a causal connection between author and work).

[25] *See* Study No. 29, *supra* note __, at 8-15.

[26] *See* 17 U.S.C. §106(3) (2012).

[27] *Id.* §101 (definition of "publication").

[28] 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §4.01 (2018).

right—which allowed them to control the public display of the work, of particular importance to works that could not be disseminated except in their original such as artwork and sculptures.[29]

Consequently, unpublished works came to obtain copyright protection—including under the distribution and display rights—as long as they met the statute's other criteria for protectability. By allowing unpublished works to be the subject of both distribution and display right claims (under §106(3) and §106(5) of the statute), copyright law today therefore allows censorial claims to be brought for *both* published and unpublished works without exception, though of course, the nature of the disseminative harm and interest remain significantly stronger for the latter.[30] This is certainly not to suggest that copyright infringement claims for the unauthorized dissemination of unpublished works are always censorial claims; just that they can well be, a reality that is often ignored.

Discussions of copyright's distribution and display rights focus on the economic harm that arises from unauthorized distribution or display of the work, principally in terms of its market effects. They ignore the simple reality that these rights are just as important to redressing non-economic disseminative harm. The distribution and display rights, as they stand today, and in the myriad variations that they have seen over time,[31] remain perfectly suited to redressing disseminative harm.

The following examples illustrate the basic working of disseminative harms and (*prima facie*[32]) censorial copyright claims under modern U.S. copyright law:

- *A* maintains a personal diary that he never shows anyone, in which he records his candid observations on the world around him. It falls into the hands of *B*, who seeks to publish it without *A*'s permission. *A* can maintain an infringement action against *B* for violations of his §106(3) public distribution right (and the reproduction right, under §106(1)[33]).

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[29] *See* 17 U.S.C. §106(5) (2012).

[30] This is certainly not to suggest that other rights—such as the reproduction right (§106(1)), the public performance right (§106(4)), or the derivative works right (§106(2))—are never implicated in censorial copyright claims. To the contrary, they routinely are, especially given that plaintiffs have little to lose by pleading additional rights. It is just that the distribution right and the public display right most directly implicate the nature of concerns involved in disseminative harm, which relate to the public revelation of expression in a work that its creator seeks to shield from public scrutiny.

[31] 2 Nimmer, *supra* note __, at §8.11[A].

[32] These are only illustrations of plaintiff's potential prima facie case and does not cover potential defenses that a defendant might be able to raise—whether successfully or not—for the action, including fair use, implied license, and first sale. These are discussed later, in the context of understanding how courts should go about adjudicating censorial copyright claims.

[33] This is a prime illustration of the idea noted above (*supra* note 31) that censorial copyright claims can implicate additional rights that are not central themselves to disseminative harm. In this illustration

- *M*, a musician, produces an early version of a new musical composition that he is wary about. Before he can finalize it, he dies. The composition gets into the hands of a music publisher, *P*, who seeks to publish it. *M*'s heirs can bring an infringement action against *P* for violations of *M*'s public distribution right under §106(3).

- *X* sends *Y* a private email message, in which he sets out his views on various political subjects. In order to shame *X*, *Y* then forwards on the email to a public listserv group. *X* can maintain an infringement action for violation of his public distribution right under §106(3).

- *P* sends his doctor, *D*, a close-up photograph of his face for a diagnosis. He takes the photograph with his cell phone camera, and it shows a dark mole on his mouth that he is worried about. *D* treats it and later, without *P*'s consent, posts the picture on his public website as an example of the skin conditions that he has successfully treated. *P* can bring an infringement action against *D* for violation of his public display right under §106(5).

These examples all have a few things in common. The infringement action is each driven by non-pecuniary considerations. Instead, in each instance the putative plaintiff seeks to curb the dissemination of the work, since it represents something personal to him/her. Part of what makes the work personal to the author in each case is the fact that the author's identity is readily discernible from the face of the work as such. In most of the examples, such identity is discernible as an objective matter; yet in one (the musician) it is at best subjectively so. As we shall see, censorial copyright claims have evolved to encompass this move as well. In each instance then, the work isn't just an artifact for its creator; it is instead a representation of the author's self.

In short then, censorial claims attempt to redress a form of non-economic copyright harm that is routinely ignored in modern discussions of copyright law—disseminative harm—and they do so primarily through the distribution right, and on occasion via the display right even though they often implicate other rights. Disseminative harm is authorial in its roots and emerges from a strong dignitary interest that the creator has in the work. And while the claim is strongest for unpublished works, it by no means is limited to that category as such, except that the nature of the harm (and the corresponding interest) gets

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publishing the diary involves making copies of it which is a violation of the reproduction right. Yet, if the publisher were to merely make copies and do nothing more, i.e., keep it locked up, it would clearly not produce the disseminative harm, for which the distribution is essential. Thus, the violation of the distribution right takes analytical precedence for disseminative harm over violations of the reproduction right, even though as a purely legal matter there is no difference.

significantly attenuated when the author has voluntarily relinquished control over the work through a publication or public distribution.

B. Disseminative Harm as Compelled Authorship

As discussed above, disseminative harm is strongly rooted in the ideas of personality and personal autonomy. Very interestingly, a rather poignant and direct account of disseminative harm is to be found in the work of the noted German philosopher Immanuel Kant, considered to be the foremost philosopher to have theorized the nature and role of individual autonomy

Kant has long been associated with a highly nuanced and deeply influential deontological account of human autonomy.[34] Kant's moral and ethical philosophy on the topic has since been internalized into an account of legal rights by legal philosophers, which has spawned a voluminous body of scholarship.[35] Initially, Kant's accounts of property and private wrongs were often used by theorists of intellectual property to construct a Kant*ian* account of such rights.[36] This approach prevailed until somewhat recently, when a relatively obscure stand-alone essay by Kant directly on the subject of author's rights came to light.[37] In this essay, Kant attempts to connect some of his thinking on autonomy and agency to the working of copyright, and yet does so

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[34] For some of Kant's most important contributions to moral philosophy see: Immanuel Kant, Critique of Pure Reason (1781); Immanuel Kant, Groundwork for the Metaphysics of Morals (1785); Immanuel Kant, Critique of Practical Reason (1787); Immanuel Kant, The Metaphysics of Moral (1797).

[35] *See, e.g.*, Arthur Ripstein, Force and Freedom: Kant's Legal and Political Philosophy (2009); B. Sharon Byrd & Joachim Hruschka, Kant and Law (2017); Ernest J. Weinrib, The Idea of Private Law (2012); Thomas C. Grey, *Serpents and Doves: A Note on Kantian Legal Theory*, 87 Colum. L. Rev. 580 (1987); George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 Colum. L. Rev. 533 (1987); George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. Ontario L. Rev. 171 (1984); Peter Benson, *External Freedom According to Kant*, 87 Colum. L. Rev. 559 (1987); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 Iowa L. Rev. 449 (1991); Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 Va. L. Rev. 1391 (2006); Stephen Gardaum, *Liberalism, Autonomy, and Moral Conflict*, 48 Stan. L. Rev. 385 (1996).

[36] *See, e.g.*, Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 Duke L.J. 383 (1999). It is worth noting that in the German legal tradition, scholars appear to have been aware of Kant's essay much earlier and developed theories of copyright that came to influence the copyright regime in Germany. *See* Sig Strömholm, *Copyright – National and International Development*, *in* 14 International Encyclopedia of Comparative Law: Copyright and Industrial Property 3, 10-11 (Friederich-Karl Beier & Gerhard Schricker eds. 1990) (discussing the role of Otto von Gierke in Germany's copyright debates and noting his reliance on Kant's essay to develop a personality-based rather than property-based justification for author's rights).

[37] Immanuel Kant, *On the Wrongfulness of Unauthorized Publication of Books*, *in* Immanuel Kant: Practical Philosophy 29-35 (Mary J. Gregor trans. 1998) (1785) (hereinafter "Kant 1785"). For leading attempts to rationalize the essay and employ it in theories of copyright law, see: Anne Barron, *Kant, Copyright and Communicative Freedom*, 31 Law & Phil. 1 (2012); Leslie Kim Treiger-Bar-Am, *Kant on Copyright: Rights of Transformative Authorship*, 25 Cardozo Arts & Ent. L.J. 1059 (2008); Abraham Drassinower, What's Wrong with Copying (2015).

independently of property and ownership rhetoric. Instead, he appears to identify a version of disseminative harm as a core concern of author's rights.

Titled *On the Wrongfulness of Unauthorized Publication of Books*,[38] Kant's essay purports to derive a basis for why copyright law treats the act of unauthorized publication as an actionable private wrong. Kant's logic originates in the recognition that there is a fundamental difference between the ownership of the physical medium in which the work is expressed, and the work itself.[39] To Kant, the work is most fundamentally a *communication*, a "speech act", on the part of the author.[40] When a publisher prints a book, the publisher is in turn purporting to act on behalf of the author by communicating on her behalf to her audience.[41] In situations when this is authorized, the author is speaking to the public through the publisher. On the other hand when this is an unauthorized publication, the publisher is purporting to speak on behalf of the author without the consent of the author; in turn forcing the author to speak against her own will, acknowledge the existence of the speech and take responsibility for it.[42] In this sense, the unauthorized publication is therefore a form of "compelled speech," which is the basis for its wrongfulness in Kant's view.[43]

On the face of things, Kant's account may appear to be of little relevance to censorial copyright claims. Censorial copyright claims are primarily concerned with unauthorized distributions, whereas Kant's focus is on reproductions. Additionally, Kant appears to limit himself to a category of works that bear a strong resemblance to speech, namely, writings. All the same there remains an important continuity between Kant's derivation and the logic of disseminative harm that becomes apparent as one digs deeper.

At the core of Kant's reasoning is the idea that publication and authorship are acts of communication, the latter direct and the former intermediated. The author's autonomy is violated in an unauthorized publication—not mere reproduction—since the publisher is purporting to communicate on behalf of the author when without authorization to do so. Kant very explicitly exempts from his rationale situations where a copier appropriates the writing of an author and publishes it in his own name, since in such situations the publisher is not purporting to speak for the author.[44] Where then does this leave an unauthorized dissemination, of the kind at issue in censorial copyright claims?

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[38] Kant (1785), *supra* note __, at 32.

[39] *Id.* at 32.

[40] *Id.* at 35.

[41] *Id.* at 32.

[42] *Id.* at 31-32.

[43] Kant himself does not use the phrase. The phrase is best known in the work of Abraham Drassinower, who builds a justification for copyright around Kantian thinking. *See* Drassinower, *supra* note __, at 111.

[44] Kant (1785), *supra* note __, at 35 (noting that this is because the copier "does not represent the first author as speaking through him").

Recall that the paradigm censorial copyright claim remains a situation where the author of a work chooses to keep it private, or in very limited circulation. Indeed under common law copyright the work needed to be unpublished, a concept that captured this limit.[45] Disseminative harm, described earlier, thus emerges principally in situations where a defendant engages in the act of "publication" or a "public display" of the work, either without the authorization of its creator. And in so doing, the defendant is effectively compelling the creator of the work to assume responsibility for it *as its author*.

The parallel between Kant's account and censorial claims now starts to become clear. Kant's idea that compelling the author to speak each time there is an unauthorized re-publication of the work in the author's name amounts to a form of compelled speech, might be logically extended one step earlier in the chain of events. Forcing a creator of the expression at issue to speak at all and thereby assume the mantle of author and its attendant moral responsibilities and consequences, is nothing less than an act of *compelled authorship*. And in so far as it forces an individual to assume responsibilities against his or her will, it is no less a denial of that individual's agency and autonomy, which renders it just as wrongful in Kant's deontological scheme, triggering an actionable private right.

While this may seem like an extension of Kant's logic in the essay to the case of disseminative harm, in reality Kant alludes to it later in the same essay. As he concludes his argument, Kant exempts from his derivation all works of art, which in his view may be freely reproduced by anyone.[46] His rationale for this is the uniqueness of artworks and the fact that once brought into existence, works of art—unlike literary works—assume a thing-like independence. As he puts it:

> This, then, is the reason that all works of art of another may be copied for sale to the public whereas books that already have their appointed publisher may not be reprinted: the first are works (*opera*), whereas the second are actions (*operae*): the former can exist on their own, as things, *whereas the latter can have their existence only in a person.* Hence these latter belong exclusively to the person of the author.[47]

This is an intriguing observation that has received little attention even from scholars who have hitherto analyzed Kant's essay. Kant appears to be suggesting that there is something "person[al]" about one category of works (writing) that is absent in another (art), and yet offers no real basis for this distinction.[48] The

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[45] *See generally* Laurence N. Walker, *Publication and the Copyright Law Revision*, 50 Calif. L. Rev. 672 (1962).

[46] Kant (1785), *supra* note __, at 34-5.

[47] *Id.* (emphasis supplied).

[48] *See id.*

basis for the distinction appears to be that books have a personal dimension associated with them since they always reveal the identity of their creator, which is rarely (or never) the case for works of art once brought into existence. This explains why book publishing is an act of speaking, since identity and content are indelibly bound up therein; but not so with art. It traces back to the distinction between artifact autonomy, where the owner's autonomy is entirely in the *res* (thing) at issue, and personal autonomy, where the autonomy (and/or its denial) directly implicates the individual's own self.

If this reading is correct, it has important implications for censorial copyright claims, which almost always involve a personal dimension where the author has invested an identifiable element of her personality into the work. A good part of what triggers the injury associated with disseminative harm is the fact that the author is forced to self-identify as the creator of expression that was intended to be kept out of circulation. This self-identification emanates from the fact that the work itself reveals the identity of its creator in some way. Censorial claims therefore revolve primarily around works that entail a personal dimension in the sense that Kant identifies in his derivation—letters, personal papers, diaries, and in more modern times "selfies", for instance.[49]

Kant's deontological rationale in his 1785 essay thus provides an excellent justification for censorial copyright claims and the disseminative harm that they are rooted in. Rooted in ideas of autonomy, communicative freedom, and private right, it in many ways works better as a justification for disseminative harm rather than appropriative harm, the original target of Kant's derivation. Authorship is a moral responsibility, in addition to entailing legal consequences. When this is foisted on an individual against his or her will, the denial of autonomy that it entails by purporting to substitute the individual's agency for that of the disseminator produces the wrong that is privately actionable.

II. DISSEMINATIVE HARM, PRIVACY, AND THE RIGHT OF DISCLOSURE

While the dignitary interest that lies at the root of disseminative harm draws on considerations of privacy and personality, it is both analytically and normatively distinct from both ideas. Over the last several decades, censorial copyright claims have come to be criticized rather extensively by scholars and courts, on the basis that the interest underlying them is better protected through

[49] A caveat is in order here. While the paradigm case of a censorial claim involves work that readily identifies its creator, the category has since grown to encompass works where this element is more subjective. The next Part discusses this expansion of the category over time. As will be seen, a good part of the reason for this expansion appears to be courts' implicit unwillingness to police the idea of authorial personality contained within the work. *See infra* Part III.

privacy claims. This approach misunderstands the nature of censorial claims in copyright and the centrality of authorial autonomy that underlies them.

This Part examines this criticism and refutes it. It begins by first examining the principal strands of the argument in favor of privacy (over copyright) as a mechanism of protecting dignitary interests (II.A). It then moves to unpacking the origins of privacy torts in American law and shows how the famous derivation of privacy logic by Warren and Brandeis consciously misstated several aspects of common law copyright as it existed at the time, and its protection for dignitary interests (II.B). II.C shows that the real analog of censorial copyright claims in Anglo-American copyright law is a lesser known moral right that is routinely invoked in civil law jurisdictions: the moral right of disclosure, which too focuses on disseminative harm, but with more limitations.

A. Privacy Torts, Not Copyright

Modern copyright scholarship is deeply critical of censorial copyright claims, premised on the argument that the dignitary interests and harms that underlie such claims are best dealt with through the law of privacy—specifically privacy torts, at the state level.[50] This view has only grown since 1976, with the passage of the new copyright statute and the elimination of common law copyright for most subject matter. Even the few scholars who are sympathetic to censorial copyright claims describe them as an "emerging scenario"[51] and do not go far enough in refuting the dominant view that "copyright is not the direct vehicle for the[] vindication"[52] of dignitary concerns, since it risks converting authorship into censorship. The dominant view is in turn driven by three primary concerns, none of which withstands close scrutiny.

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[50] *See, e.g.*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1130 (1990) ("[C]opyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so."); Jeffrey L. Harrison, *Privacy, Copyright, and Letters*, 3 Elon L. Rev. 161, 163 (2012) ("In the context of copyright law, privacy is really something to be avoided."); Alfred Yen, *The Challenge of Following Good Advice About Copyright and the First Amendment*, 15 Chi.-Kent J. Intell. Prop. 412, 413 (2016); Jeanne C. Fromer, *Should the Law Care Why Intellectual Property Rights Have Been Asserted?*, 53 Hous. L. Rev. 549, 557-65, 587 (2015); Margaret McKeown, *Censorship in the Guise of Authorship: Harmonizing Copyright and the First Amendment*, 15 Chi.-Kent J. Intell. Prop. 1, 16-17 (2016). For counterpoints, see: Deirdre Keller, *Copyright to the Rescue: Should Copyright Protect Privacy*, 20 UCLA J.L. & Tech. 1, 36 (2016) (finding such protection legitimate but suggesting that U.S. law recognize a moral right of disclosure); Andrew Gilden, *Copyright's Market Gibberish*, 85 Wash. L. Rev. (forthcoming 2019) (arguing that copyright routinely protects non-economic interests including dignitary harms but masks this protection in the language of the market).

[51] Margaret Chon, *Copyright's Other Functions*, 15 Chi.-Kent J. Intell. Prop. 364, 364 (2016). It is worth noting that overall Chon appears to be sympathetic to the recognition of privacy and dignitary claims in copyright law. *Id.* at 366 ("Privacy and other function of copyright should not be categorically excluded as beyond the legitimate purview of copyright's concerns, and copyright will not be stretched beyond its breaking point by incorporating them.").

[52] McKeown, *supra* note __, at 16.

1. Copyright Utilitarianism

The principal reason for the extensive skepticism seen towards censorial copyright claims emanates from the belief that copyright's exclusive purpose lies in it serving as a market-based incentive for the production of creative works. Deriving from the seemingly instrumentalist wording of the Constitution and its mandate that copyright legislation strive to "promote the progress,"[53] this view roots all of the copyright system in the need to provide creators with an inducement to produce original expression through the market.[54] In this view, since censorial claims derive from a strong dignitary interest and the works at issue are unmoved by pecuniary considerations, copyright law ought to pay (little or) no attention to them. Infringement lawsuits brought exclusively to vindicate a dignitary interest, i.e., with no commercial/economic rationale, ought to be discouraged.[55]

Accepting copyright's utilitarian logic as its principal theoretical justification certainly does not necessitate denying the existence of other non-utilitarian normative values operating within the system. While normatively essentialist accounts of legal doctrines and institutions may present a degree of theoretical elegance in discussions of the system, they routinely fail to capture the practical machinations of legal doctrine and the complex behavioral motivations of the participants involved.[56]

What such essentialist accounts also ignore is the simple reality that copyright doctrine—with the exception of one statutory provision[57]—shows no marked affinity for the utilitarian rationale as its dominant (let alone exclusive) justificatory vision. This has in turn allowed the facially neutral language of copyright doctrine to adapt itself to varying normative considerations over time, in precisely the same manner as the rest of the common law.[58] Copyright's

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[53] U.S. Const., Art. I, § 8, Cl. 8.

[54] *See* William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 326 (1989); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 Harv. L. Rev. 1569, 1576–77 (2009).

[55] *See* McKeown, *supra* note __, at 16 ("[C]opyright can be everything to everybody.").

[56] For what is perhaps the best known critique of this essentialism in academic legal theorizing involving law and economics, see: Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 Va. L. Rev. 451, 458-59 (1974) (noting how the economic analysis of law underemphasizes the complexity of human behavior and is driven by an effort to avoid the "complexity" of the real legal system).

[57] 17 U.S.C. §107(4) (2015) (requiring courts to examine "the effect of the use upon the potential market for or value of the copyrighted work" as part of the fair use analysis).

[58] For an account of how this might occur, see: Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. Pa. L. Rev. 1241 (2015). Jody Kraus has described a similar evolution in common law meaning as the process of "radical semantic evolution". Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 Va. L. Rev. 287, 326 (2007).

infringement analysis is a prime example here, as is the joint works doctrine.[59] Therefore, while it may well be true as a normative and interpretive matter that today's copyright thinking desires an exclusively utilitarian framing for the institution, this is hardly an essential attribute of the system such that deontological considerations such as the author's dignitary interest can find no place in its working.

In short then, the overt utilitarian turn in copyright law, which some see as emanating from the influence of twentieth century neoclassical economic thinking,[60] is far from being a principled reason to critique the legitimacy of censorial copyright claims. To the contrary, normative pluralism has remained a hallmark of the copyright landscape, much like it has for a variety of legal institutions. Courts and scholars may find such pluralism messy and hard to theorize, yet in practice it has served copyright rather well over time. Censorial copyright claims, as we shall see, pre-date copyright's utilitarian turn, and thus are as legitimate in the copyright landscape as are other economically driven claims.

2. Free Speech Concerns

A second argument often raised against the use of copyright law to protect an author's dignitary interests via censorial claims is a concern with free speech, or the idea that authorship might be used as a vehicle for censorship. As an illustration of this concern, the recent case of *Garcia v. Google*[61] is often raised to show how the plaintiff's non-pecuniary motives were little more than an attempt at squelching speech. *Garcia* involved a plaintiff who, without her knowledge, came to be portrayed in a controversial and offensive motion picture, and thereafter sought to have the motion picture taken down from public viewing by making the argument that she was the sole author of her individual performance in the work.[62] The Ninth Circuit denied her claim, but in so doing noted that her claim was of a dignitary nature, which was inappropriate for copyright law since it sought to suppress speech.[63] The court echoed the idea that privacy was not the function of copyright law and noted:

> We are sympathetic to her plight. Nonetheless, the claim against Google is grounded in copyright law, not privacy, emotional distress, or tort law, and

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[59] For pluralist accounts of these doctrines, see: Shyamkrishna Balganesh, *The Normativity of Copying in Copyright Law*, 62 Duke L.J. 203 (2012); Shyamkrishna Balganesh, *Unplanned Coauthorship*, 100 Va. L. Rev. 1683 (2014).

[60] Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 306 (1996).

[61] Garcia v. Google, Inc., 786 F. 3d 733 (9th Cir. 2015) (en banc)

[62] *Id.* at 737-40.

[63] *Id.* at 753.

> Garcia seeks to impose speech restrictions under copyright laws meant to foster rather than repress free expression.[64]

The concern with free speech, seen in the court's framing and elsewhere, is overstated. In some sense, there was nothing uniquely speech-suppressive in the plaintiff's argument in *Garcia*, and different from the remedy sought by any copyright-plaintiff in a takedown action. Indeed, as scholars have pointed out, all requests for injunctive relief in copyright cases involves speech suppression as an analytical matter and copyright has never had a problem with this reality as a matter of principle.[65] Instead, courts have over time found ways and means to balance these competing concerns and incorporate them into the calculus for such relief.[66]

It is worth noting that the idea of free speech, seen in the *Garcia* opinion, is a common rhetorical device that courts use to their advantage to justify outcomes. In *Garcia*, the Ninth Circuit used it to deny relief. This is in contrast to the Supreme Court's decision in *Harper & Row v. Nation*,[67] where speech considerations were treated as overblown since copyright was itself "the engine of free expression."[68] At other times, courts have reiterated that copyright's multiple safety valves—fair use, the idea/expression dichotomy, and the like—are sufficient to guard against any free speech concerns.[69] Yet, the Ninth Circuit made no mention of this.

Copyright has various free speech protective devices that can come into play in censorial claims. The most notable of these is fair use. Indeed, a scrutiny of various censorial copyright claims indicates that in several such cases, defendants raise the defense of fair use, which courts use as a stand-in for free speech concerns, and balance against the plaintiff's claims.[70] Given the robustness of these mechanisms, there appears to be no credible concern that as a principled matter copyright protection for dignitary (or privacy) concerns risks converting authorship into censorship.

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[64] *Id.* at 737.

[65] *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147, 165 (1998).

[66] The most obvious of which is the "public interest" factor in the four factors used to determine whether injunctive relief is appropriate. *See* eBay, Inc. v. MercExchange LLC., 547 U.S. 391 (2006); Salinger v. Colting, 607 F. 3d 68, 82-3 (2d Cir. 2010).

[67] Harper & Row, Pubs., Inc. v. Nation Enterps., 471 U.S. 539 (1985).

[68] *Id.* at 558.

[69] *See* Eldred v. Ashcroft, 537 U.S. 186, 219 (2003) ("[C]opyright law contains built-in First Amendment accommodations.").

[70] *See, e.g.*, Monge v. Maya Magazines, Inc., 688 F. 3d 1164, 1170 (9th Cir. 2012); Balsley v. LFP, Inc., 691 F. 3d 747, 758 (6th Cir. 2012).

3. Better Fit

Courts and scholars also commonly dismiss any copyright protection for dignitary concerns with the argument that privacy law—privacy tort actions in particular—are better fits for such concerns.[71] A part of this objection has to do with the normative essentialism discussed previously, and the belief that censorial claims are hard to reconcile with copyright's utilitarian basis. Relatedly though, they also derive from the idea that privacy torts are better suited to protecting dignitary interests. It is this last point that deserves some additional attention.

As noted earlier, the dignitary interest underlying disseminative harm and censorial copyright claims entails more than just a concern with privacy. It implicates considerations of personality and personal autonomy, in the way of *authorial autonomy*. This is hardly an incidental feature of such actions, but central to their existence. And the involvement of authorial autonomy adds a distinctive component to the action that takes it away from a mere concern with privacy. Courts routinely overlook this point.[72]

To fully appreciate this divergence, consider the difference between an intimate photograph taken as a selfie, i.e., by the person who is both the subject of the photograph and its author (the "selfie"), and an intimate photograph taken by a third party without the subject's consent (the "paparazzi photo"). An unauthorized public distribution of the photograph is likely to be seen as troubling by the subject of the photo in both instances, but for similar yet qualitatively distinct reasons.

With the paparazzi photo, both the creation and distribution of the photo are incursions upon the subject's ability to represent intimate details about himself or herself to the world in public. With the selfie, the creation is obviously not an issue, but its distribution is. Here, the distribution of the photograph certainly amounts to an interference with the subject's self-representation to the world but that interference is compounded by the representation of the subject's own authorship to the public. In other words what is harmful to the subject is not just a revelation of the intimate details contained in the photograph, but also the disclosure of the subject's own authorship of those details in the photograph.

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[71] *See, e.g.*, *Garcia*, 786 F. 3d at 745 ("Privacy laws, not copyright may offer remedies tailored to [plaintiff's] personal and reputational harms."); New Era Pubs. Int'l v. Henry Holt & Co., 695 F. Supp. 1493, 1505 (S.D.N.Y. 1988) ("An individual who seeks to protect the privacy of the content of private letters may do so by bringing suit under the right of privacy.").

[72] Indeed, they overlook this point even while granting a plaintiff's claims. *See, e.g.*, *Monge*, 688 F. 3d at 1168-73 (omitting any discussion of the plaintiff's status as author of the works at issue even while finding in favor of the plaintiff). *Garcia*, which is routinely—and wrongly—set forth as an example of a failed privacy/dignitary claim involved a fundamental contest to the authorial status of the plaintiff, which made it qualitatively different from a regular censorial claim since the very existence of a valid authorial dignitary interest was thereby contested. *Garcia*, 786 F. 3d at 740-45.

The two are inextricably bound up, rendering the selfie different from the paparazzi photograph. The subject-authored nature of the expression adds an important component to the nature of the concerns that the subject is likely to have, making it distinct in an important way from the non-consensual paparazzi photograph.

The fact that the subject authored the photograph himself or herself makes the harm from the unauthorized distribution more—rather than less—significant, in that the subject-driven (i.e., more authentic) nature of the creation is itself potentially more damaging to the author-subject. The photograph was created for one purpose, as determined by its author, yet used by the defendant for another. This act represents a denial of autonomy to the subject of the photograph, not just in his or her capacity as subject but more importantly in his or her capacity as subject-author, where the two cannot be disconnected.

These two scenarios might be contrasted with a third one where a professional photographer takes an intimate photograph of a subject with the subject's consent (the "posed photo"). Now the subject of the photograph has no claim, be it in privacy or copyright, against the professional photographer owing to the consent (in the case of privacy) and the photographer's authorship and ownership of the work (in the case of copyright). If a third party seeks to make an unauthorized distribution of the photograph, the subject is now dependent on the photographer bringing the action.[73] No considerations of authorial autonomy are implicated for the subject of the photograph. Should the subject (as transferee of the copyright) seek to bring a claim against the third party, it would be primarily as owner of the work—based on the idea of artifact autonomy. The contrast between these three scenarios above serves to highlight how the dignitary interest underlying censorial copyright claims involves a combination of representational and authorial concerns that are incapable of disaggregation.

Censorial copyright claims therefore involve a combination of representational and authorial concerns that are incapable of disaggregation. Privacy torts, most notably the tort of public disclosure of private facts, focus on representational autonomy and the individual's ability to control public representations of their persona.[74] They are premised on an element of subject *passivity*, in that they view the denial of such autonomy as emanating from the subject's desire to keep certain facets of her persona private and scrutinize the existence of that desire rather carefully. The non-consensual public disclosure of such facts is seen to cast the passive subject into the public and in turn produce potential emotional and reputational harm. This analytical structure is ill-suited to situations where the subject remains an *active* participant in the chain of

[73] As was the case in *Balsley*. *See Balsley*, 691 F. 3d at 755-56.

[74] The continued viability of this tort remains suspect, and scholars have long noted how its invocation is today strongly disfavored. *See, e.g.*, Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 Yale J.L. & Hums. 171 (2010); John A. Jurata Jr., *The Tort that Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 San Diego L. Rev. 489 (1999).

events, by *both* exercising a critical role in the production of the content that is made public and choosing to control when and whether to disseminate it. In these situations, the subject's autonomy is not just about self-representation to the public but instead about self-representation to the public *as author*. And this makes censorial copyright claims a rather poor fit for privacy torts.[75] Adjudicating such claims will involve addressing questions such as the appropriate scope of authorship, which privacy torts are just not concerned with.

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In summary then, the claim that disseminative harm and its underlying deontological interest are both better served through privacy laws, does not withstand serious analytical and normative scrutiny. It instead emanates from an overly simplistic understanding of the interests involved in such claims, coupled with an exalted view of what privacy torts can cover. Indeed, hardly any scholar or court advancing the view that privacy law and not copyright should be where these claims are brought, has actually shown how censorial copyright claims and the interests that they seek to vindicate might actually work under the tort of privacy. In the end, much of the argument appears to be driven by a desire to maintain a normatively coherent account of copyright law, which ironically, contradicts the very evolution of the privacy/copyright divide.

B. Warren & Brandeis and the Privacy/Copyright Conflation

As discussed above, courts and scholars routinely take the position that while privacy and dignitary interests are legitimate and deserve some protection, they are nevertheless not relevant to copyright and its purposes.[76] The criticism is closely tied to the independent development and flourishing of "privacy torts", private causes of action under state law that purport to protect a plaintiff's

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[75] Indeed, there are aspects of privacy law doctrine that render it inapposite for censorial copyright claims. If one considers the privacy tort of "public disclosure of private facts," a rather fundamental requirement is that the content disclosed is "highly offensive to a reasonable person" which is a largely objective determination. *See* Restatement of Torts (Second) §652D(a) (1977). This would eliminate a huge swath of censorial copyright claims that are hardly offensive on their face, but nevertheless remain an affront to the dignitary interest of the author. Additionally, the tort's concept of "public disclosure" does not track the concept of "publication" such that private or semi-private communications that are not accessible by members of the public are unlikely to qualify as violations. *Id.* §652D cmt. a. (""Publicity," on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.").

[76] *See, e.g.*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1130 (1990) ("[C]opyright law is grotesquely inappropriate to protect privacy and obviously was not fashioned to do so."). Judge Leval took the same position in one of his opinions addressing the question, at the district court level. New Era Pubs. In'tl v. Henry Holt & Co., Inc., 695 F. Supp. 1493, 1504 (S.D.N.Y. 1988) (" It is universally recognized, however, that the protection of privacy is not the function of our copyright law.").

reputational, personal, and emotional interests against invasion by defendants.[77] The origins of these privacy torts is commonly traced to a seminal article penned at the end of the nineteenth century by Samuel Warren and Louis Brandeis, wherein they are understood to have articulated a rationale and analytical basis for the common law to develop an independent set of actions for privacy.[78] Consequently, their argument is seen today as the basis for excising personal, dignitary considerations from copyright and quarantining them into the independent category of privacy torts.

The Warren and Brandeis argument however betrays an important irony. In developing their logic and reasoning for the protection of privacy—or the "right to be let alone[79]" as they put it—Warren and Brandeis make an important move that scholars writing about the copyright/privacy interface overlook or underplay. And this is the fact that they base the entirety of their reasoning in the article on the working of copyright law as it existed at the time, and specifically therein on the extant protection that nineteenth copyright law afforded against disseminative harm through censorial claims for infringement. Warren and Brandeis make the entire premise of their article abundantly clear fairly early on, with the observation that "the legal doctrines relating to infractions of what is ordinarily termed the common-law right to intellectual and artistic property are, it is believed, but instances and applications of a general right to privacy, which properly understood afford a remedy for the evils under consideration.[80]" In attempting to derive the logic for an independent right to privacy, the article goes to some length to undermine the legitimacy of censorial claims and disseminative harm to copyright. Yet its reasoning to this end is spurious.

As noted above, Warren and Brandeis locate the general logic of privacy within the domain of copyright, specifically within common law copyright since statutory copyright at the time did not apply to unpublished works, a distinction that has since been abrogated. They then set out the core of their argument with the following description of copyright protection—and censorial claims:

> The existence of this right [i.e., copyright] does not depend upon the particular method of expression adopted. … Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression… *In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent…* The right is lost only when the

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[77] *See* William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960); Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 Calif. L. Rev. 1805 (2010).

[78] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

[79] *Id.* at 195.

[80] *Id.* at 198.

> author himself communicates his production to the public...*[T]he common law protection enables him to control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all*.[81]

If copyright law at the time covered what they were advocating, what then was the basis for taking it *out* of copyright, and into a distinct cause of action? The answer to them lay in copyright's supposedly mistaken reliance on the notion of "property". They thus argue:

> But where the value of the production is found not in the right to take the profits arising from publication, but in the peace of mind or the relief afforded by the ability to prevent any publication at all, it is difficult to regard the right as one's property, in the common acceptation of that term….[T]he protection afforded to thoughts, sentiments, and emotions, expressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right of the individual to be let alone. It is like the right not to be assaulted or beaten, the right not to be imprisoned, the right not to be maliciously prosecuted, the right not to be defamed…The principal which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.[82]

As support for this observation, they cite to a leading nineteenth century copyright law treatise, which merely notes that the term property as applied to censorial claims was "an expression perhaps not quite satisfactory, but on the other hand sufficiently descriptive of a right which, however incorporeal, involves many of the essential elements of property, and is at least positive and definite.[83]" They then rather hastily surmise that the primary reason that the law had been using the term "property" for these claims was in order to make the entitlement applicable against the world at large—i.e., *in rem*, and for this cite to the landmark copyright case of *Folsom v. Marsh*, which involved a dispute over the publication of George Washington's collected letters.[84] Warren and Brandeis argue that Justice Story's adoption of the property idea for common law copyright in the case was *in order to* overcome the notion of privity that would have precluded an action for breach of an implied contract.[85] Yet a close

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[81] *Id.* at 198-99 (emphasis added).

[82] *Id.* at 205.

[83] George Ticknor Curtis, A Treatise on the Law of Copyright 94 (1847).

[84] 9 F. Cas. 342 (C.C.D. Mass. 1841).

[85] Warren & Brandeis, *supra* note __, at 211.

reading of the opinion hardly suggests this motive but instead merely indicates that Justice Story recognized the ability of the owner to go after third parties not in privity as a *consequence* of such ownership.[86]

What their analysis misses is the reality that by the nineteenth century common law copyright—or indeed all of copyright—no longer needed to be characterized as "property" for its *in rem* nature to be accepted. While courts and scholars did continue to refer to copyright as "literary property," the act of unauthorized copying had quite independently come to be understood as an injurious wrong analogous to a regular tort action that allowed an action to be brought against third parties independent of a contract.[87] To the extent that courts deployed property language, it is fairly obvious that they were doing so as part of their dicta and for largely expository—rather than analytical—purposes.

Nevertheless, by emphasizing the connection between copyright claims and the idea of property, Warren and Brandeis were making an implicit analytical move that proved to be influential. And this was the idea that property implied an economic motivation, which censorial copyright claims lacked, in contrast to more standard pecuniary copyright claims. The idea of property thus served to drive a wedge between standard (i.e., economic) copyright claims and censorial copyright claims, with the latter then seemingly more aligned with other non-pecuniary causes of action.

An additional reason for courts' invocation of property in dealing with censorial copyright claims—which Warren and Brandeis happily ignore—relates to the remedy that plaintiffs ordinarily sought in those cases, namely, an injunction. As is well known, equity allowed an injunction to follow whenever an entitlement was classified as a form of "property", an artificial classification that came under criticism fairly early on, and which came to be eventually repudiated.[88] The early censorial copyright cases, many of which Warren and

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[86] Justice Story thus observes: "The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. A fortiori, third persons, standing in no privity with either party, are not entitled to publish them, to subserve their own private purposes of interest or curiosity, or passion." *Folsom*, 9 F. Cas. at 346. His use of the term "a fortiori" clearly implies the identification of a consequence rather than a cause, contrary to what Warren and Brandeis claim.

[87] As an example, consider the 1834 Supreme Court case of *Wheaton v. Peters*, 33 U.S. 591 (1834). *Wheaton* was the first copyright case decided by the Court and centered on the existence of common law copyright after the enactment of the federal copyright statute in 1791. What is interesting to note though was that even though the Court (and the litigants) use property rhetoric in the case, the action itself was brought using an "action on the case," a writ that had developed to conflate the distinction between property and personal actions, and had come to recognize that the existence of a property interest could be secondary to the existence of an injurious wrongdoing by the defendant. *See* Keeble v. Hickeringill, (1707) 103 E.R. 1127 (Eng.). *See also* Elizabeth Jean Dix, *The Origins of the Action of Trespass on the Case*, 46 Yale L.J. 1142 (1937).

[88] For an early account of this distinction, see: Roscoe Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 Harv. L. Rev. 640 (1915) (describing this position and criticizing it).

Brandeis rely on,[89] routinely rely on this distinction in invoking their equitable jurisdiction in favor of plaintiffs. The characterization of the copyright entitlement as property had little analytical basis, and was therefore a unique product of equity's own rigidity. None of this, of course, mattered to Warren and Brandeis.

Given their explicit agenda, which was the identification and derivation of an independently protectable privacy interest in the common law, Warren and Brandeis had little need to be cautious in their characterization of these past copyright cases and the language therein. In relying on the emptiness of property language for their argument, they offer no independent understanding of property as a limiting idea, so as to show that privacy is analytically (or normatively) distinct from property. Indeed they equivocated in their own analysis, by conceding that property may have meant little more than the right to exclude (as an *in rem* entitlement), in which case courts' invocation of the idea for non-economic harms might obviously seem less problematic.[90]

Despite their reliance on common law copyright for their derivation of the right to privacy, Warren and Brandeis do not once make mention of a central feature of all the censorial copyright claims that they rely on, namely that the action in each case was brought by the author of the work, rendering it functionally a personal claim and throwing direct focus not just on the representational issue but also on authorial autonomy. Emphasizing the authorial aspect of censorial copyright claims would have perhaps undermined their case for a stand-alone right to privacy; nevertheless given the centrality of authorship as a normative matter to those claims its omission is stark.

Despite all of this, the Warren and Brandeis article had the effect of influencing state courts in the creation of privacy torts.[91] In this development though, courts seem to have paid scant attention to the possibility of copyright—common law or statutory—offering plaintiffs a more efficacious remedy in certain situations. The main indirect effect over time was simply that these claims, which had once been a legitimate part of copyright jurisprudence, eventually came to be seen as palpably illegitimate within copyright.[92] Copyright law's eventual utilitarian turn only served to solidify this view and build on the property/non-property logic that their article put forth.

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[89] As a prime example consider the case of *Gee v. Pritchard*, 2 Swans. 408, 425 (1818) (emphasizing the nature of the copyright interest to be property in order to validate an injunction). Warren and Brandeis refer to *Gee*, but completely overlook this aspect of the decision. *See* Warren & Brandeis, *supra* note __, at 200 n.3.

[90] Warren & Brandeis, *supra* note __, at 213.

[91] For an early discussion of this influence by 1960, see: Prosser, *supra* note __, at 385-89.

[92] So much so that by 1985, the Supreme Court noted that "[i]t is true that common law copyright was often enlisted in the service of personal privacy," reversing the order that Warren & Brandeis had identified in their argument. *Harper & Row*, 471 U.S. at 555.

Even if Warren and Brandeis are seen to have made a compelling argument for the development of independent privacy torts and the existence of a "right to privacy", nowhere does their analysis recommend eliminating the personal claims that they identify from the ambit of copyright law. To the contrary, in so far as they identify copyright law to be a sub-set of a general action to protect individual privacy, they seem to imply the continuing legitimacy of such claims under copyright. While this may not be true for privacy claims that do not involve authorial subject matter and/or original expression, it is certainly the case for material that does. And yet, scholars have read the Warren and Brandeis article as recommending a dramatic reduction in copyright's scope, in furtherance of a right to privacy.[93]

What is also perplexing, though perhaps an unremarkable reality of its era, is that the Warren and Brandeis article makes no effort to offer a normative justification for treating privacy claims as a separate cause, beyond its formalist treatment of the property idea. Nor do they offer any structural/procedural reasons for it. To the contrary, they disregard the possibility of there being strong normative reasons for retaining these claims (at least partially, if not wholly) within copyright law—deriving from the ideas of authorship and authorial autonomy discussed previously.

As Warren and Brandeis see it, disseminative harm is the very basis of the right to privacy. While they may be right to see in it elements of the need "to be let alone," they altogether disregard the centrality of authorship and self-expression in instances of such harm, which formed the very basis for copyright's inclusion of such harm within its overall ambit. Much of their analysis is strongly persuasive when it involves informational claims that do not involve original expression or implicate third party non-author plaintiffs.

Contrary to much of today's accepted wisdom then, the right to privacy does not exhaust the gamut of claims and interests that plaintiffs have over personal content. The intellectual lineage of the Warren/Brandeis argument and their disaffection for the analytical and normative basis of censorial copyright claims on which they based their entire analysis, aptly reveals this point. The expanding domain of privacy law coupled with the utilitarian turn in copyright have only served to allow their argument to flourish, whilst ignoring the reality that disseminative harm is a distinct form of harm within the panoply of legitimate copyright harms.

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[93] *But see* Pamela Samuelson, *Protecting Privacy through Copyright Law*, *in* Privacy in the Modern Age: The Search for Solutions 191 (Marc Rotenberg et al. eds. 2015) (analyzing the privacy/copyright connection in the Warren & Brandeis article and unlike other scholars remaining equivocal about allowing copyright to retake some of the domain that has been excised from it in the name of privacy).

C. Simulating (and Enlarging) the Moral Right of Disclosure

While privacy torts may thus be an imperfect home for the dignitary interest involved in censorial copyright claims, there is nevertheless a cause of action recognized in some countries that presents a closer analog: the moral right of disclosure.

Until the year 1990, federal copyright law consciously distanced itself from providing authors with "moral rights", a set of rights that have for long been recognized and protected in civil law jurisdictions.[94] Premised on the idea of ensuring respect for the work and the author's connection to it, these rights are seen as emanating from the very act of authorship, inalienable, and functionally distinct from copyright's exclusive economic rights.[95] Of the myriad moral rights recognized in these jurisdictions, the attribution right and integrity right remain the best known—and are indeed the only moral rights that are today recognized at the federal level in the U.S.[96] Less well known is a right that is infrequently invoked, yet of some significance: the right of disclosure.

The right of disclosure protects the author before the work is released publicly. Until the author is ready to divulge or disclose it publicly, the right allows the author to prevent any dissemination of the work against his/her wishes.[97] As a corollary, it also allows the author to prevent its dissemination if the author chooses to abandon or discard the work without publicly distributing it. What is however essential to the operation of the right is that the work be deemed incomplete by the author.[98] In essence therefore it is directed at protecting the creative process, and the author's autonomy and control over deciding when that process has terminated and the work is ready for release to the public—i.e., in deciding when to become an author.

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[94] For a general overview of moral rights protection see: Mira T. Sundara Rajan, Moral Rights: Principles, Practice and New Technology 31 (2011); Cyrill P. Rigamonti, *Deconstructing Moral Rights*, 47 Harv. Int'l L.J. 353 (2006); Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law—A Proposal*, 24 S. Cal. L. Rev. 75 (1951).

[95] *See* Sundara Rajan, *supra* note __, at 7.

[96] 17 U.S.C. §106A (2012). *See also* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 Vand. L. Rev. 1 (1985).

[97] *See* Raymond Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 Am. J. Comp. L. 465, 467-73 (1968). *See also* Carl H. Settlemyer III, *Between Thought and Possession: Artist's Moral Rights and Public Access to Creative Works*, 81 Geo. L.J. 2291, 2329-44 (1993); Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 Colum.-VLA J.L. & Arts 199, 203-06 (1995).

[98] As one leading scholar of French law put it:

> So long as a work of art has not been completely created—of which the artist alone can be the judge—it remains a mere expression of its creator's personality, and has no existence beyond that which he tentatively intends to give it. … He alone is able to determine when it should be disclosed, put into circulation, and treated as a chattel which may be exploited for profit.
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> Sarraute, *supra* note __, at 467.

Upon joining the Berne Convention in 1989, Congress decided to accord authors some minimal form of moral rights protection in the United States, through the Visual Artists Rights Act of 1990.[99] It did so by recognizing the rights of integrity and attribution, the only rights which found recognition in the convention.[100] The legislative history of the 1976 Act reveals that Congress was well aware of the disclosure right and made a conscious decision to avoid recognizing it in the statute at the time.[101] It adhered to this position in 1990.

Censorial copyright claims operate as a substantial (if not complete) replacement for the moral right of disclosure.[102] Even prior to the current Act of 1976, common law copyright afforded authors protection for their unpublished work, which was seen as doing the same work as the disclosure right.[103] Indeed, in some respects it was broader in so far as it was not limited to incomplete works, unless of course the act of publication was seen as part of the completion. With the abolition of common law copyright for published works and the simultaneous elimination of publication as a pre-requisite for federal copyright protection, censorial copyright claims—which operate under the exclusive rights to publicly distribute and/or display the work—operate as a full replacement for the absence of the disclosure right. In reality, post-1976 claims go further than their common law equivalents in allowing for protection even when the work is fixed and published, but not *publicly* distributed or displayed.

The revenge pornography example, discussed earlier, offers a useful illustration of this equivalence and indeed of the more protective nature of censorial copyright claims. The victim of the unauthorized dissemination would not have had a claim under the moral right of disclosure, for two interrelated reasons. First, the work was hardly incomplete—from the moment it was fixed; and second, it was indeed "disclosed" in some sense, even if only to the private recipient. By contrast, neither of these issues present obstacles to a successful censorial copyright claim.

Conversely, if one examines the most prominent continental cases where the moral right of disclosure was successfully invoked, it is apparent that they would each be sufficiently covered by the scope of modern censorial copyright claims. Each of these cases usually involved a familiar pattern.[104] An artist enters into an agreement with a buyer to produce a work of art and then prior to the work's completion either dies or abandons the project. When the buyer then

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[99] Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128.

[100] 17 U.S.C. §106A; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221, art. 6bis.

[101] William Strauss, Study No. 4: The Moral Right of the Author 120-21 (1959).

[102] For an early recognition of this point, see: James M. Treece, *American Law Analogues of the Author's "Moral Right"*, 16 Am. J. Comp. L. 487, 493 (1968). For a recent argument advocating for the right in order to protect privacy interests in American copyright law, see: Keller, *supra* note __, at 38.

[103] Treece, *supra* note __, at 493.

[104] Sarraute, *supra* note __, at 467-73 (discussing the *Whistler, Camoin, Rouault*, and *Bonnard* cases).

chooses to display and distribute the work publicly, the author successfully invokes the right of disclosure to prevent this from happening. Under post-1976 copyright law, these cases would all be covered by censorial copyright claims—emanating from the public distribution and/or public display rights. The buyer's actions in each instance unquestionably amounts to either a public distribution or public display which was not authorized by the artist, allowing for a successful claim. Consequently, censorial copyright claims, especially post-1976, more than substitute for the lack of a moral right of disclosure in U.S. copyright law.

Indeed, the normative logic for the existence of the right of disclosure in continental jurisdictions originates in the idea of avoiding disseminative harm to the author of the work. It emanates from a trenchant commitment to authorial autonomy, a commitment that views the author/creator as the "master" of the work, with personal and potentially idiosyncratic preferences and choices that nevertheless deserve respect and serious validation in order to preserve such autonomy.[105] Such is the strength of this right that even in situations where it would be objectively wasteful and meaningless to allow the right to be exercised (and for the work to be withheld from the public), the exercise of the right by an author is permitted in the interests of preserving such autonomy.[106] In Anglo-American copyright systems, censorial copyright claims afford authors the near same amount of protection against disseminative harm as the moral right of disclosure.

III. The Evolution of Censorial Copyright Claims

Censorial copyright claims are almost as old as Anglo-American copyright law itself. The logic underlying their functioning began to take shape shortly after the passage of the Statute of Anne in 1710. In the three centuries since, they have obviously mutated and adapted to society's changing conceptions of privacy, personal autonomy, copyright's coverage of new subject matter. This Part describes the evolution of censorial copyright claims over the years. Despite its shifting contours, copyright law has remained steadfast in its protection for the dignitary interest underlying these claims, a reality that is often forgotten in modern discussions of the subject.

An examination of censorial copyright claims over the years reveals three interrelated trends that are worth describing at the outset. *First*, fairly early

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[105] *Id.* at 467 (quoting the *Whistler* case as using this language to describe the artist's control over the work).

[106] As was the situation in the *Camoin* case, where the artist had trashed his incomplete work of art, but a third party found it and sought to restore and display it, which resulted in the court siding with the artist and disallowing the third party's actions despite the obvious wastefulness of this outcome. Camoin v. Carco, Cour d'appel [CA]] [regional court of appeal] Paris, March 6, 1931; DP. 1931, 2 p.88, note M. Nast; S. 1932, 2 (Fr.).

on in the development of censorial copyright claims, we see courts disavowing an objective verification of the dignitary interest—and corresponding disseminative harm—involved and instead allowing the author to assert a subjective conception of the interest and corresponding harm from the defendant's actions. This had the obvious effect of expanding the scope of censorial claims.

Second, in keeping with the move away from assessing the personal content of the work, we see courts occasionally justifying censorial copyright claims using an inchoate labor theory of authorship.[107] Unlike a Kantian approach based on authorial autonomy (and compelled authorship), a labor-based account enabled courts to focus on the process of authorship, without having to examine or assess the product of that the process as such—i.e., the content of the work.

Third, by the advent of the twentieth century we see courts refusing to expressly identify the plaintiff's interest in dignitary terms except while denying the claim as illegitimate. Instead, when choosing to recognize and enforce such claims courts prefer to rely entirely on the neutral language of copyright doctrine that requires no scrutiny of the plaintiff's motives or of the nature of harm produced by the defendant. Far from implying the disappearance of censorial copyright claims, it instead suggests a turn towards formalist reasoning in copyright adjudication.

A. Early English Law

With the passage of the Statute of Anne in 1710,[108] the first Anglo-American copyright statute, it wasn't long before the first censorial copyright claim made its way to court. Ironically, the case was also one of the first ever copyright cases under the statute to be brought by an author, the new recipients of rights under the legislation.[109] The case was *Pope v. Curl*, well-known among copyright scholars and historians as the first case to hold that copyright protection subsists in letters, even when physical possession of those letters had been transferred to another.[110]

Decided in 1741 by the Court of Chancery, *Pope* involved a claim by the famous poet Alexander Pope against a defendant bookseller who sought to

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[107] Inchoate only in the sense that it was never built into a fuller labor theory of ownership along the lines offered by some applying Locke's theory to copyright. For applications of Locke to copyright, see: Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 Ohio St. L.J. 517 (1990); Carys J. Craig, *Locke, Labour, and Limiting the Author's Right: A Warning Against a Lockean Approach to Copyright*, 28 Queens L.J. 1 (2002); Jonathan Peterson, *Lockean Property and Literary Works*, 14 Legal Theory 257 (2008).

[108] 8 Anne c. 21 (1710).

[109] *See* Mark Rose, *The Author in Court:* Pope v. Curll *(1741)*, 21 Cultural Critique 197, 198 (1992)

[110] *See id.*

publish a collection of letters between Pope and the famed author Jonathan Swift.[111] The extremely short opinion of just a page does little justice to the complexity of the case. As Mark Rose has documented, the case was in many ways a set up wherein Pope sought to manage his image as a "gentleman and a scholar rather than as a professional."[112] While he wanted to eventually publish his own correspondence, he did not want to be seen as doing so as a commercial matter and therefore lured the defendant into publishing his letters so as to be able to claim moral outrage over the act and appear to be preserving his honor and dignity.[113]

When the defendant in the case published his correspondence without his consent, Pope made his argument for copyright infringement in personal rather than economic terms, arguing that such publication was a form of "betraying conversation" and socially harmful.[114] There appears to have been nothing particularly problematic or embarrassing in the content of the letters themselves, which Pope of course knew since he fully intended their eventual publication.[115] This in turn motivated his framing of the matter in terms of "honor" and "decency" from the bare act of publication rather than any specific kind of harm from the disclosure of the particular contents of any letters at issue. This also pushed his legal argument in the case (made forcefully by William Murray, who would go on to become none other than Lord Mansfield, the noted copyright jurist[116]) in the direction of content neutrality. Pope was not claiming any particular harm or embarrassment from the specific content of the letters involved, but harm from the very fact of their disclosure against his will. To him this was a matter of "authorial honor and reputation."[117] And in order to do this, his complaint invoked the logic of authorial property.

The defendant however sought to rebut Pope's claim on two primary prongs. First, on the question of property he argued that the true owners of the letters were their recipients, rather than their authors such as Pope.[118] And second, he sought to refute the idea of content neutrality by claiming that the copyright statute was designed with literary works in mind, which these letters could not be fairly said to represent. The court's decision in turn responded to both points.[119]

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[111] Pope v. Curl, 2 Atk. 342 (1741) (Ch. U.K.).

[112] Rose, *supra* note __, at 202.

[113] *Id.* at 204-05.

[114] *Id.* at 204.

[115] *See id.* at 202-05.

[116] *See* Bernard L. Shientag, *Lord Mansfield Revisited—A Modern Assessment*, 10 Fordham L. Rev. 345 (1941).

[117] Rose, *supra* note __, at 205.

[118] *Pope*, 2 Atk. At 342-43.

[119] *Id.*

While acknowledging that the Statute of Anne was designed for "the encouragement of learning", the court nevertheless refused to make a distinction between a book of letters and "any other learned work."[120] It offered no reason other than that such a distinction "would be extremely mischievous."[121] On the property question, the court drew a distinction between ownership of the physical letter and ownership of its content, noting that it was only the latter that authorized publication and which vested in the author.[122] The opinion then returned to the question of the statute and offered some additional clarification on its conclusion that letters could obtain protection:

> It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps were never intended to be published; and it is this makes them so valuable; for I must confess for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading.[123]

This is a peculiar but nevertheless important observation for our purposes. What the court is suggesting is that the very fact that the work at issue was intended to be kept private, renders it in some ways more worthy of protection as a learned work—perhaps because it presents a more honest picture of the subject.[124] What we see in this observation and the overall opinion is a court that is on the one hand unwilling to directly examine whether the plaintiff suffered any specific harm as a result of the publication, but on the other engaging the question of protectability by trying to show how letters are themselves literary works in the spirit of that category.

Pope thus set forth the principle that letters were protectable subject matter under statutory copyright. And soon enough additional cases followed suit.[125] But whereas the plaintiff and court in *Pope* had refrained from addressing the objective content of the letters and the effects of its publication, later litigants became more willing to use the private and potentially embarrassing content of the letters to advance an objective view of the harm that would accrue from its publication.

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[120] *Id.* at 342.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 343.

[124] The law of evidence adopts a similar position, which is perhaps what the court was alluding to. Modern evidence law considers contemporaneous written accounts of an event to represent an exception to hearsay and as such then admissible when the declarant is available to testify. *See* Fed. R. Evidence Rule 803(1).

[125] *See, e.g.*, Lord Percival v. Phipps, 2 Ves. & B. 19 (1813); Earl of Granard v. Dunkin, 1 Ball & Beat. 207 (1809).

One such case was *Thompson v. Stanhope*, where the plaintiffs were the executors of an earl, who was a "public character".[126] Over the course of his lifetime, he corresponded extensively with his son and in these letters "drew the characters or persons, and wrote upon the subject of politics" in addition to a variety of other matters intended as instruction for his son.[127] When his son died, the earl allowed the letters to remain in the possession of his widow, the defendant. Following the earl's death, the widow sought to have the letters published, while his heirs objected, arguing that his intention was always to have the letters be destroyed after his death, and sought an injunction.[128] Implicit in their objection was thus that the publication would impact the public reputation and honor of its author, who had always intended to therefore keep them private. Without much reasoning, the court granted the injunction. Pressed with the argument that the letters contained valuable content that the public deserved to see, the court "recommended it to the executors to permit the publication, in case they saw no objection to the work upon reading it."[129]

Whereas *Pope* chose to remain completely agnostic to the content of the plaintiff's letters and proceed on the mere recognition of the letters as literary works, *Thompson* appears to have accepted the potentially embarrassing and personal nature of the content, but almost completely outsourced that recognition to the plaintiff without any further scrutiny.

Censorial copyright claims reached their fullest recognition a short while later, in the case of *Gee v. Pritchard*,[130] where the court was asked to grapple with the sensitive nature of the expression involved. The defendant in the case was the step-son of the plaintiff, and over the course of his life has been in correspondence with the plaintiff.[131] In such correspondence, the plaintiff had often communicated matter of a "private and confidential nature" to him relating to "moral and conduct in life".[132] When they had a falling out, the defendant threatened to publish the correspondence, which the plaintiff contested as a "violation of [her] right and interest" and noted that it was "intended to wound her feelings."[133] On this basis, she sought an injunction.

What is interesting about the case is that it is reported as a colloquy between the court and the plaintiff, wherein the court appears to be searching for an appropriate basis/right upon which to afford relief. Early on in the argument, the court rejects the plaintiff's argument about hurt feelings, noting that "the

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[126] Thompson v. Stanhope, Amb. 737, 737-38 (1774).

[127] *Id.*

[128] *Id.*

[129] *Id.* at 740.

[130] Gee v. Pritchard, 2 Swans. 403 (1818).

[131] *Id.* at 403-04.

[132] *Id.* at 404.

[133] *Id.* at 405.

continuance or the discontinuance of [a] friendship" can form no basis for the relief.[134] While expressing some limited skepticism about the principle, the court nevertheless concluded that letters were legitimate literary works and could qualify for protection as property, which would entitle the plaintiff to an injunction.[135] All the same, the argument about "feelings" was not completely irrelevant, which triggered the following observation from the court:

> I do not say that I am to interfere because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff; but if mischievous effects of that kind can be apprehended in cases in which this Court has been accustomed, on the ground of property, to forbid publication, it would not become me to abandon the jurisdiction which my predecessors have exercised, and refuse to forbid it.[136]

The court's language while intriguing, has been the subject of significant interpretive disagreement ever since.[137] It is rooted in the distinction between law and equity, which soon became defunct.[138] Premised on the idea that "equity follows the law", courts of equity often required proof of a right at law before they would interfere and grant relief.[139] What the court appears to be advancing is the argument that the plaintiff's subjective assessment of dignitary harm cannot form the jurisdictional basis of its intervention, it may nevertheless be the basis for the court's relief once such jurisdiction is established on the basis of "property", i.e., copyright. Warren and Brandeis saw in *Gee* a move towards recognizing wounded feelings as the basis for its intervention, which is obviously incorrect.[140] Instead, the court drew a distinction between the basis of its jurisdiction for intervention, and the plaintiff's reasons for seeking relief. Authorial property justified the former, the plaintiff's subjective claim of dignitary harm the latter.

The court's refusal to fully engage the nature of the "feelings" and the specific nature of harm likely to accrue from the publication of the work may be

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[134] *Id.* at 413.

[135] *Id.* at 414.

[136] *Id.* at 426.

[137] *See generally* W.B.G., *A Re-interpretation of Gee v. Pritchard*, 25 Mich. L. Rev. 889 (1927); Megan Richardson, The Right to Privacy: Origins and Influence of a Nineteenth-Century Idea 27 (2017).

[138] For an account of the law/equity distinction and its origins see: F.W. Maitland, Equity: A Court of Lectures (1936); S.F.C. Milsom, Historical Foundations of the Common Law 74 (1969). For an account of the law/equity merger and its effects see: Andrew Burrows, *We Do This At Common Law But That At Equity*, 22 Oxford J. Legal Stud. 1 (2002).

[139] For an account of this maxim and its application, see: Zechariah Chafee, Jr., *Does Equity Follow the Law of Torts*, 75 U. Pa. L. Rev. 1 (1926) (describing an applying the maxim "*aequitas sequitur legem*").

[140] *See* Warren & Brandeis, *supra* note __, at 200 (arguing that the court's use of property was a stand-in for privacy concerns). For a criticism of this interpretation, see: W.B.G., *supra* note __, at 890.

partially explained by a rule that prevailed at the time, which denied copyright protection—both common law and statutory—for works that were unlawful or immoral.[141] Lord Eldon, the author of the opinion in *Gee*, had in the year before it decided another well-known case involving the right of first publication wherein the plaintiff had transmitted the manuscript of a libelous poem to the defendant with the intention of publishing it, but before its publication changed his mind.[142] When the defendant nevertheless went ahead and published it, the plaintiff sought an injunction, claiming a violation of his right. Lord Eldon denied the relief on the basis that the plaintiff's very right was in question because the work was not "innocent".[143] Consequently, a fuller investigation into the nature of the plaintiff's dignitary interest in censorial copyright cases would have had courts running into considerations of libel, morality, and bad faith, that would have sullied the nature of the right at issue and undermined their jurisdiction. It is perhaps for this reason that Lord Eldon himself is fairly cryptic in *Gee* about the nature of the feelings at issue, an approach that would cement the subjective nature of the harm involved in such cases.

The broadest—and most controversial—expansion of censorial copyright claims was to come a few years later, in the celebrated case of *Prince Albert v. Strange*.[144] The case cemented the basis for a court's intervention on a subjective conception of dignitary harm, but made the further move towards identifying a distinctive privacy interest. The case involved drawings and etchings that the Queen and her husband were in the practice of making as a hobby for their amusement.[145] These drawings were "of subjects of private and domestic interest to themselves" and to ensure their privacy, they took great pains to have them printed by a private press and retained possession of the plates themselves.[146] Somehow the drawings got into the hands of the defendant, who proposed to hold a public exhibition showcasing them and to that end printed a catalogue describing all the works that were to be exhibited there.[147] The plaintiffs took exception to this and sought an injunction.

In its opinion, the court considered it wholly unexceptional that the work at issue was a work of art—rather than a literary work—and readily acknowledged the plaintiff's right. The principal basis of the plaintiff's argument rested on the "right to determine whether [to] publish [the work] or not", i.e., the "right to the first publication" which the court acceded to.[148] Yet,

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[141] Drone, *supra* note __, at 112-13.

[142] Southey v. Sherwood, 2 Mer. 437 (1817).

[143] *Id.* at 437-38.

[144] 1 Mac. & G. 25 (1849).

[145] *Id.* at 27.

[146] *Id.* at 27-8.

[147] *Id.* at 28-9.

[148] *Id.* at 37.

the court went one step further and held that the defendant's catalogue was nothing more than "a means of communicating knowledge and information of the original", which would harm the plaintiff's personal interests just as much and accordingly enjoined the publication and distribution of the catalogue as well.[149] While this extension of protection heralded the onset of a separate privacy interest in the common law, it also had the effect of conflating the dignitary interest underlying the plaintiff's copyright claim, which was rooted in both representational and authorial autonomy unlike the privacy claim that sounded in personal autonomy.

Nevertheless, for our purposes *Prince Albert* suggests that by the mid-nineteenth century censorial copyright claims had become largely unexceptional, especially at equity where the relief sought was an injunction. The court's statement that "[t]he property of an author or composer of any work, whether of literature, art, or science, in such work unpublished and kept for his private use or pleasure, cannot be disputed" is telling in this regard.[150] Not only was it now irrelevant whether the work qualified for protection under the statute, but the law had grown perfectly content with assuming the existence of a dignitary interest based on the plaintiffs' assertions and deferring to them on the question. This in turn got turned into the right of first publication, specifically for unpublished works.

The early development of censorial copyright claims highlights a few things. *First*, courts' principal concern in these cases—at least initially—centered around whether the works at issue could qualify as protectable subject matter under the terms of the statute. They readily answered this in the affirmative by denying the need for any scrutiny of the work's substantive merits, a position that would continue well into the future. (A secondary concern was the extent to which a plaintiff's claim had been abandoned by virtue of the limited/private communication of the content, and for which they relied on the distinction between possessory and incorporeal property.) *Second*, while courts recognized the dignitary nature of the plaintiffs' motivations in the cases that were brought, they did no more than suggest that these concerns were legitimate, and consciously avoided any deeper examination of their credibility. In so accepting a subjective version of the plaintiff's account of harm, they were likely avoiding getting entangled in the domestic affairs of the litigants, many of who were prominent personalities at the time, or in the complex interplay between copyright, libel, morality and public policy. It also had the effect of allowing them to proceed using the formal language of the law without having to make any special exceptions for the nature of the interest at issue. This, in turn, allowed the domain of censorial claims to expand beyond just literary works, to other categories where the plaintiff asserted similar motivations and showed the

[149] *Id.* at 43.

[150] *Id.* at 42.

existence of a valid right. *Third* and finally, an overwhelming majority of these cases were brought at equity, since the plaintiff was seeking an injunction. This enabled the court to exercise a greater degree of flexibility and discretion in molding the bases for its jurisdiction and interference in the case.

B. Early American Law

The first U.S. copyright statute, the Act of 1790, was modeled in large part on the Statute of Anne.[151] The earliest reported censorial copyright claim was brought shortly after, in 1811 and adopted a noticeably different approach from its English counterparts. While it relied on English precedents for its position, the court openly embraced a more objective approach to the dignitary interest at issue.

This was the case of *Denis v. LeClerc*.[152] The facts involved a letter written by the plaintiff to a lady wherein he sought to "pay[] his addresses" to her, i.e., attempted to court her.[153] The content of the letter was therefore obviously private and potentially embarrassing. The defendant, through means unknown, obtained copies of the letter and sought to publish it, to which the plaintiff objected. At first, the plaintiff obtained an injunction. In his answer to the injunction, the defendant annexed a copy of the letter and filed it in the office of court clerk, after which he advertised publicly that others interested in reading the letter might do so by visiting the clerk's office.[154] The plaintiff then approached the court again, seeking to hold the defendant in contempt, which the court obliged in an elaborate opinion.

The court initially described the relevant English authorities to confirm the validity of the plaintiff's right to the injunction. Interestingly enough, the defendant attempted to distinguish these authorities by pointing out that whereas the defendants in those cases had all been seeking to publish the letters at issue and thereby seek a profit, he—i.e., the defendant—had clear non-monetary reasons for his actions in that he was doing so "with the sole view of disclosing the writers secrets and wounding his feelings."[155] The court found this argument to be of no consequence, but instead to even more strongly favor the plaintiff's right.[156] Additionally, this concession by the defendant thereafter allowed the court to venture into the nature of the harm that the defendant was attempting to bring about, which required a closer examination of the work itself.

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[151] 1 Stat. 124 (1790).

[152] 1 Mart. (o.s.) 297 (La. 1811).

[153] *Id.* at 312.

[154] *Id.* at 297.

[155] *Id.* at 305.

[156] *Id.* at 305-06.

Canvassing a whole set of French, English and Roman authors on the ethics and morality of publishing private correspondence, the court observed that when letters were "written with mystery and contain[ed] confidential things", the wrong from revealing their content was even greater when the "secret of a letter is unveiled *with the only design of* doing an injury to the writer."[157] The plaintiff's effort to "open his heart, without any apprehension of that being revealed" in his letter covered in "mystery and confidence" was worthy of additional protection from the defendant's public actions, which were entirely to "vex the plaintiff".[158] And thus the court adopted an overtly objective approach towards the plaintiff's dignitary interest and the corresponding disseminative harm, through a closer examination of the contents of the letter and the defendant's motives in publicizing it. In so doing, it unwittingly broke with prior English precedents.[159]

While early American cases approvingly cited and relied on English precedents for their principles, they at the same time went out of their way to add more justificatory content for their holdings. This is in clear contrast to their English counterparts, which were tersely worded and often structured using the language of formal rules and principles. In so doing, American courts often unknowingly deviated from English law. Much of this appears to have also been influenced by prominent legal treatise writers, many of who were deeply influential in the jurisprudence of the time.[160]

Joseph Story, for instance, in his classical work on equity devoted an entire section to understanding how courts of equity approached the issue of injunctions in cases involving the publication of private letters.[161] While he drew from the finite set of English precedents, he attempted to synthesize them using rational principles. This synthesis added a gloss that was hardly appreciated at the time. Unlike any of the English cases, Story offered a rationale for protecting the publication of private letters:

> In a moral view, the publication of such letters… is perhaps one of the most odious breaches of private confidence, of social duty, and of honorable feelings, which can well be imagined. It strikes at the root of

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[157] *Id.* at 312.

[158] *Id.*

[159] As an apparent last effort, the defendant in *Denis* also raised the argument that the injunction impeded the "freedom of the press" embodied in the First Amendment. Again, the court rejected this argument with the observation that an open-ended claim of this sort would mean that any "propagation" of a slander or libel would remain non-actionable. It then entered a judgment for the plaintiff, found the defendant to be in contempt and imposed a monetary fine on the defendant in addition to ordering that he be imprisoned for "for ten days" owing to the contempt.

[160] For the authoritative account of this, see: A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and Forms of Legal Literature*, 48 U. Chi. L. Rev. 632, 668-74 (1981) (describing the contrasting influence and growth of American legal treatises and their English counterparts).

[161] 2 Joseph Story, Commentaries on Equity Jurisprudence 218-222 (1866).

> all hat free and mutual interchange of advice, opinions, and sentiments, between relatives and friends, and correspondents, which is so essential to the well-being of society, and to the spirit of a liberal courtesy and refinement. It may involve whole families in great distress, from the public display of facts and circumstances, which were reposed in the bosoms of others under the deepest and most affecting confidence, that they should for ever remain inviolable secrets.[162]

Story thus offered a theory of harm for copyright law's intervention in such instances. While his account of harm encompassed disseminative harm—of a private nature—it also very interesting adopted a collectivist mindset in large part. The harm, in other words, was not just the actual effect on the plaintiff-author, but additionally on the fabric of society as a whole, since it would alter the form and nature of individual communications as a result. Not all legal treatises were this forceful; some merely offered an account of English precedents.[163]

Story's account formed the basis for the court's intervention in the 1855 New York case of *Woolsey v. Judd*, regarded as having settled the question of copyright protection for private letters under American law.[164] It also cemented the legitimacy of censorial copyright claims. The defendant in the case was the editor of a local newspaper and sought to publish a few private letters written by the plaintiff that he had come into possession of.[165] His motive was "fixing upon the plaintiff… the imputation of being the authors or instigators of certain anonymous and abusive publications, relative to a religious society."[166]

The court began its elaborate and wordy opinion by first noting that the Copyright Act of 1831 specifically empowered courts to grant injunctions to "restrain the publication" of a work sought to be published "without the consent of the author."[167] It then canvassed the English authorities in exquisite detail to confirm the existence of the plaintiff's right *qua* author of the letters. Relying on Story's exposition, the court agreed that the basis for its intervention needed to be an actual legal property right, and not just the possibility of harm to the plaintiff from the publication.[168] The basis of this right was in the court's view just like the ordinary rights of chattel ownership. Just as an artist who produces "a painting [that is] a wretched daub" or a "statue [that is] a lamentable abortion" has the right to prevent "its public exhibition" against his will which "would

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[162] *Id.* at 220.

[163] *See, e.g.*, George Ticknor Curtis, A Treatise on the Law of Copyright 89-100 (1847).

[164] 11 How. Pr. 49 (N.Y. 1855).

[165] *Id.* at 49-51.

[166] *Id.* at 51.

[167] *Id.* at 51-2.

[168] *Id.* at 53-4.

disgrace the artist", the same would apply to literary property.[169] The nature of this right was in the court's view "absolute", in that ensuring the non-dissemination of the work was a viable basis for relief. "As owner, he has an absolute right to suppress as well as to publish; and he is as fully entitled to the protection and aid of the court, when suppression is his sole and averred object, as when he intends to publish."[170]

The *Woolsey* court went to great lengths to distance the basis of copyright protection in the plaintiff's work from any need to show either market significance or literary merit. Neither "intended publication" nor "pecuniary value" were requirements for protection as copyrightable subject matter, in the court's view.[171] The court also rejected any scrutiny of the substance of the work for its "intrinsic merits", so as to connect it to the plaintiff's basis for suppressing it.[172]

A related move seen in the opinion is the court's effort to distance the plaintiff's effort to suppress the work—i.e., its censorial nature—from what is often described as the right of first publication.[173] As an affirmative right, the right of first publication entitles the author to determine when and how to publish the work. Yet, as an analytical matter it appears premised on the existence of an intention to publish the work, which could be taken to imply that when the author openly disavows such an intention, the right disappears.[174] Early English case law on the right of first publication had for the most part involved pecuniary motives on the part of either/both plaintiffs and defendants.[175] To the *Woolsey* court, the two were analytically distinct even if considered sides of the same coin. The right in the unpublished letters was the right "to control the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all."[176] To equate the two, would be to deny "that the writer has any title to relief at all, when his object is not to publish, but to suppress."[177]

In settling a host of interpretive questions surrounding unpublished letters, *Woolsey* also confirmed the place of censorial copyright claims under American copyright law. And it did so not just as a matter of common law

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[169] *Id.* at 57.

[170] *Id.* at 58.

[171] *Id.* at 70.

[172] *Id.* at 71.

[173] For an excellent account of the right of first publication, see: Jake Linford, *A Second Look at the Right of First Publication*, 58 J. Cop. Soc'y U.S.A. 585 (2011).

[174] Of course, this was incorrect analytically, and as understood today. *See* Harper & Row Pubs., Inc. v. Nation Enters., 471 U.S. 539, 553 (1985).

[175] *See* Linford, *supra* note __, at 597-600.

[176] *Woolsey*, 11 How. Pr. at 72.

[177] *Id.*

copyright, but as an interpretation of the federal statute and its allowance for an injunction to restrain an unauthorized publication. Perhaps most importantly though, in seeking to strengthen the independent analytical basis of the plaintiff's right, which it described as "absolute" and "unlimited," the court effectively returned the law of censorial copyright claims back to relying on a purely subjective conception of harm. Indeed in some respects, *Woolsey* went beyond the English precedents in so far as it consciously allowed for the possibility that the plaintiff have *no verifiable reason* for the exercise of its right through the claim, which would nevertheless allow the court to move forward on a presumption of some reason since the law was to concern itself with no more than the bare existence of the right.

Later courts adopted the logic of *Woolsey* and maintained its adherence to an absolute conception of the right, which would entitle the plaintiff to suppress the work for any reason, without inviting the court's scrutiny of the particular harm being complained of.[178] This approach reached its pinnacle by the early twentieth century. Drawing this conclusion from the precedents, one Massachusetts court concluded that the matter was capable of derivation "on principle", quite independent of authorities as well and sought to root the idea—of the irrelevance of harm—on the basis of a labor-desert argument.[179] The bluntness of property thinking therefore readily intermingled with courts' ready presumption of disseminative harm.

Early American jurisprudence on censorial copyright claims built on English doctrine, and in so doing synthesized, rationalized, and justified the analytical basis of these claims. While American courts as a whole took the nature of the plaintiff's dignitary interest and corresponding disseminative harm much more seriously in their actual exposition of the case and the rationalization of claims therein, they at the same time sought to distance the legal doctrine itself from being contingent on proof of such harm, preferring instead to validate the outcome in the formal doctrinal concepts of property (ownership/title) and tort (wrong). This latter move was but a reflection of an approach to legal reasoning that dominated at the time; yet it had the effect of cementing the legitimacy of censorial copyright claims by allowing disseminative harm to flourish as an independent—yet unstated and unexamined—category of harms that a plaintiff's copyright claim could legitimately form the basis for. This expository aspect of harm highlights an important transition in the development of censorial copyright claims, in that it moved the idea away from the domain of *damnum sine injuria* (harm without an actionable injury) but not quite into the territory of *injuria sine damno* (an actionable injury without

[178] *See, e.g.*, Grigsby v. Breckinridge, 2 Bush 480 (Ky. 1867); Barrett v. Fish, 72 Vt. 18 (1899).

[179] Baker v. Libbie, 210 Mass. 599, 604 (1912).

proof/verification of harm).[180] That latter move occurred in the modern era, as copyright law became heavily statutory, and with it judicial decisions on the topic less expository and more interpretive.

C. Modern Federal Copyright Law

[*This Section will examine the evolution of censorial copyright claims under the Copyright Acts of 1909 and 1976. Under the 1909 Act, the express preservation of the right of first publication encouraged the further development of these claims, which got caught up in part with the ambiguity in the jurisprudence about publication. The 1976 Act omitted any express discussion of this right, since it eliminated any meaningful role for publication. Instead, it forced censorial claims into the abstract language of the distribution right, which generated its own set of problems—including the general devaluation of disseminative harm by courts, focused instead on copyright's utilitarian goals. The simultaneous growth of fair use also played an important role in this evolution, especially in so far as it was seen as a direct First Amendment lever*.]

IV. CENSORIAL COPYRIGHT CLAIMS AND CENSORSHIP

[*Having set up censorial copyright claims as a legitimate category of actions within copyright law, this Part will examine its direct interface with the First Amendment and free speech concerns therein. It will then argue that the continued legitimacy of these claims is dependent on courts finding a mechanism to address the free speech implications that they present on an individualized basis. Accordingly, it will propose a framework for courts to adopt, drawing on the Court's attempt to balance other censorial claims (e.g., defamation) with the First Amendment.*

Instead of relying on fair use to do the balancing, a better solution might be the use of a court's equitable discretion in its review of an injunction, the primary remedy that is sought in censorial cases. In specific the "public interest" prong of the four-factor test presents a fruitful domain for courts to work their balancing, allowing them to weigh and compare private and collectivist considerations.]

CONCLUSION

[180] For a fuller account of the distinction, see: Herbert Broom, Commentaries on the Common Law 75-85 (4th ed. 1873).